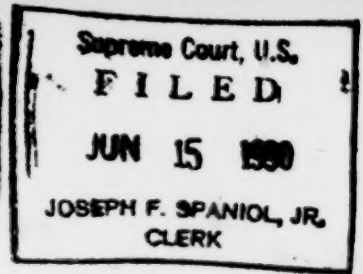


89-1969



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARIE M. MCMAHON

Petitioner,

v.

DONALD H. KENT

JOHN H. JOHNSTON

DONALD L. BOWMAN

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARIE M. MCMAHON

Petitioner in pro per

103 Pratt Street

Berkeley Springs, WV 25411

(304) 258-1117



QUESTIONS FOR REVIEW

1. Does any court have discretion to act, or not act, concerning Constitutional issues presented to said court by Petitioner or any litigant?

2. Does the court lose jurisdiction of the proceedings before said court when that court fails to act in accord with Constitutional and/or any substantive provision required to give litigants due process per United States Constitution?

3. When does loss of jurisdiction take place, i.e., if it is during the proceedings, is it at the instant the Constitutional and/or substantive violation takes place by such court?

4. If jurisdiction is lost by the court for any reason, is any judgment and/or verdict by such court after loss of jurisdiction, valid or void?

5. Is it provided for, legal and proper under the Supremacy Clause of the United States Constitution for Petitioner or any litigant to petition THIS COURT directly from any lower court for redress for the refusal, ignoring, or any type violation of the rights of Petitioner or any litigant which is provided for by the United States Constitution?

6. Is any member of the judiciary lawyer, judge, or any person, immune from liability when the facts show any act of conspiracy to pre-determine the outcome of the controversy?

7. Is a judge immune from liability for damages when the facts clearly show said judge denied Constitutional /substantive rights provided Petitioner and all, denied, per said laws?

8. Does Petitioner or any person, citizen, taxpayer have the right to Petition the Government (courts) for redress under the First Amendment where the public welfare is at stake?

9. Does Petitioner or any Person have the right to be free from injuries caused by another for violations of the Constitution and/or statutes?

10. Is the welfare of the public demanding of THIS COURT to write very strong and thorough opinions concerning the above questions so as to at least (a) insure Constitutional Rights for Petitioner and the public, (b) send a message to any arbitrary and corrupt judiciary and (c) reinforce the positions of those who are ethical in the legal profession?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	iv
I Grounds for jurisdiction of the U.S. Supreme Court	1
II Constitutional and statutory provisions	1
III Statement of the Case	4
IV Argument/Discussion of Applicable Laws	16
V Petitioner's rights violated (due all) at Circuit Court level	24
VI District Court's violations of rights and Rule 12	25
VII Petitioner (and all) have Constitutional Rights to be protected from illegal arbitrary judiciary	25
VIII Conclusion	25
IX Appendix	A-1

TABLE OF AUTHORITIES

CASES:

Anderson v. Liberty Lobby Inc.	16
477 U. S. 242, 91 L Ed 2d 208 (1986)	
Ashelman v. Pope	23,24
769 F 2d 1360 (1985)	
Barger v. State of Kansas	22
620 F Supp 432 (1985)	
Bass v. Hoagland	19
172 F 2d 205 (1949)	
Beard v. Udall	23
648 F 2d 1264 (1985)	
Boyd v. Bulala	19
672 F Supp. 915 (W.D. Va. 1987)	
Clarke v. Taylor	25
71 Va. (30 Gratt) (1978)	
Conley v. Gibson	17
355 U. S. 41, 78 S. Ct. 99, 2 L Ed 2d 80	
Daniels v. Williams	20
88 L Ed 2d 672, 106 S. Ct. 678 (1986)	
Garrison v. United States	16
62 F 2d 41 (4th Cir 1932)	
Gillispie v. Civiletti	24
629 F 2d 637 (1980)	
Hagg v. Cuyahoga County	17, 22
619 F Supp 362 (1985)	
Holt v. Virginia	18
381 U.S. 131, 85 S. Ct. 1375 (1965)	
Johnson v. Zerbst	18
304 U. S. 458, 58 S. Ct. 1019 (1938)	
Lynk v. La Porta Superior Court No. 2	21
789 F 2d 554 (7th Cir 1986) 437 f. F 2d 385	
Mitchell v. King	17
537 F/ 2MND 385	
Ryland v. Shapiro	21
708 F 2d 967 (1983)	
Singer v. Wadman	22
595 F Supp 188 (1982)	
Temple v. Moses	18
175 Va 320, 8 S.E. 2d 262 (1940)	
United States v. Sawyer	18
423 F 2d 1335 (4th Cir 1970)	

OPINIONS BELOW

4th Circuit Order	A-10
4th Circuit Order re Rehearing/Rehearing in BANC	A-1
District Court Order	A-33
District Court Order re Reconsideration	A-42
Circuit Court Order in No. 10607	A-53

I

JURISDICTION OF U. S. SUPREME COURT

On March 19, 1990, the United States Court of Appeals for the Fourth Circuit denied Petition for Rehearing/Rehearing in BANC (per rules 40 and 35, A-64) and reaffirmed United States District Court's Order (Eastern District of Virginia, Alexandria Division) (A1) (please note the 4th Circuit change) dismissing Petitioner's Complaint (A2) using Rule 12 request by Respondent Johnston herein.

On February 27, 1990, The Fourth Circuit Court of Appeals denied Petitioner's appeal from District Court (A16).

The Supreme Court of The United States has jurisdiction to review the Judgment in question under 28, U. S. C. section 1254 (1) , 2106, Rule 10, Rules of Supreme Court and Rule 17, Civil Rules of Civil Procedure.

II

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment to the United States Constitution.

"Courts shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press. or the right of the people peaceable to assemble and to petition the Government for a redress of grievances."

2. Seventh Amendment to the United States Constitution

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury. shall be otherwise reexamined in any Court of the United States than according to the common law."

3. Fourteenth Amendment to the United States Constitution Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

4. 42 USC, section 1983 Civil Action for Deprivation of Rights
"Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

5. 42 USC section 1985 (2) Conspiracy to Interfere with Civil Rights. Obstructing justice...

"If two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any State or Territory, with intent do deny to any citizen the equal protection of the laws, or to injure him of his property for lawfully enforcing or attempting to enforce the right of any person, or class of persons, to the equal protection of the laws;

1985 (3) Depriving persons of rights or privileges." If two or more persons in any State...conspire, ...for the purpose of depriving, either directly or indirectly, any person...of the equal protection of the laws, or of equal privileges and immunities under the laws,...for the purpose of preventing or hindering...all persons within such state...the equal protection of the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of deprivation, against any one or more of the Conspirators."

6. West Virginia Code 30-2-12.

"If an attorney-at-law or agent shall, by his negligence or improper conduct, lose any debt or other money of his client,

he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal, and it may be recovered from him by suit or motion."

7. Virginia Code 8.01-221 Damages from Violation of Statute, Remedy Therefor and Penalty.

"Any person injured by violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, even though a penalty of forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. And the damages so; sustained together with any penalty or forfeiture imposed for the violation of the statute may be recovered in a single action when the same person is entitled to both damages and penalty; the existing statutes of limitations applicable to the foregoing causes of action respectively."

8. West Virginia has a similar statute to the one above cited and so does Virginia have a similar Statute to West Virginia Code 30-2-12, cited above.

9. Michie's Jurisprudence, Agency at Pg 543 There is...

"No particular form of contract required in creating an agency and may be written or unwritten." Two elements are required:

(1) The agent be subject to the principal's right to control and

(2) The work has to be done in the business of the principal or

for his benefit. Under Powers, Michie's states..."The holder or owner of a power of appointment has a property right in that power."

10. Black's Law Dictionary: Power of Attorney. "An instrument authorizing another to act as one's agent or attorney". (page 1334) Agent. "A person authorized by another to act for him, one intrusted with another's business"..."One who deals not only with things,"..."but with persons, using his own discretion as to means, and frequently establishing **contractual** relations between his principal and third persons." (pages 85/86).

Fiduciary Relation. "An expression including both technical fiduciary relations and those informal relations which exist whenever one man trusts and relies upon another."..."**A relation subsisting between**

two persons in regard to a business, contracts, or piece of property, or in regard to the general business of estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith.”...“Examples of fiduciary relations are those existing between attorney and client, guardian and ward, principal and agent, executor and heir” ... (Black’s pages 753/754).

11. 7 Am Jur 2d , section, 4.

“The trust and confidence necessarily reposed in an attorney by clients require in the attorney a high standard and appreciation of his duty to his clients, his profession, the courts and public. He has a duty to support the Constitutions and laws of the United States and the State.”

12. 7A C.J.S. section 272 (Attorney-Clients).

“The case should not be withdrawn from the jury or ruled on as a matter of law where the evidence raises an issue of fact.

Issues of fact for the jury include liability for breach of contract or malpractice, and the existence of an attorney-client relationship with respect to an act or omission on which a malpractice claim is based. Other questions of fact for the jury include the exercise of a reasonable degree of skill and skill in representing and advising the client, performance or neglect of a reasonable duty, the question of the attorney’s negligence in connection with the prosecution or defense of previous litigation for which he was employed, and whether specific conduct constitutes malpractice.

Issues of fact for the jury also arises with respect to negligence as the proximate cause of loss to the client; what the outcome of a case would have been if it had been properly tried by the attorney, such as if the attorney had conducted a proper investigation, presentation, or exclusion of evidence, or other steps bearing on a decision based on the facts, fraud or other misconduct on the part of the attorney, the actual loss sustained by the client and damages.”

III

STATEMENT OF THE CASE

In this instant action which is a spin-off of a spin-off case (actually two cases because of refiling the original case and there are four other related cases which have meet similar fate to this instant case) courts and lawyers for both sides of the controversy have ignored and/or denied United States Constitutional rights to Petitioner (and her Principals) such as trial by jury, access to court, right to petition for redress, equal protection, privileges and immunities, due process, etc. Additionally, State Constitutions have also been ignored and/or violated, as have Rules of Civil Procedure, all provided for benefit of all people.

There has been concerted efforts by F & M, Inc. (Farmers & Merchants National Bank, Inc.,) and the Judiciary, to protect each other and act contrary to documented admissible, relevant evidence (per Rules of Evidence which should have had the above applicable laws applied by those who had the duty to do so), to use their positions against Petitioner's Principals, initially, who are uneducated, unsophisticated, younger than chronological years by far (Bart and Alice Whirley, husband/wife) and one not so dumb paralegal (Petitioner) who is as determined to try to do right and "go by the books" as the adverse parties and those complained of herein are determined to do wrong.

Petitioner has general power of attorney from/with Bart/Alice Whirley, their full trust and knows all the facts of the cases better than they because of a long (approximately 15 year mother/daughter relationship) with Bart's grandmother. Petitioner also **made a solemn promise** to Bart's Grandmother(Ann S. Schrader) to do all Petitioner could legally so as to see that Bart was not cheated out of his inheritance (real property). Hence, she is determined to do to the best of her ability her fiduciary duty to Principals...fight for return to all of us the constitutional provisions which have been lost and thusly, is seeking justice for herself and her Principals (and for all).

Said illegal acts are by both State and Federal Actors and in willful participation with State actors. Jurisdiction should have been lost by the courts per their own oaths of office and their own illegal acts, abuse of power, etc.

Petitioner filed her Complaint in District Court and invoked its jurisdiction under 28 USC, section 1332, 1343 and 42 USC sections 1983 and 1985., to obtain damages, costs, etc., suffered by Petitioner caused by Respondent's violation of her rights guaranteed by the First, Seventh

and Fourteenth Amendments of the United States Constitution and by Federal Statutes 42 USC 1983 and 1985 (Petitioner also has a related case pending final outcome in West Virginia State Court resisting enforcement of the judgment granted by Respondent Kent herein.)

The District Court dismissed Petitioner's Complaint under Rule 12, on February 24, 1989 (A-33) and on March 10, 1989, denied reconsideration (A-42).

Respondent's pleadings concerning the above are at, (A-11) Notice; at (A-12) Motion to Dismiss; Brief in Support of Motion to Dismiss is at (A-14).

Petitioner's Motion to Deny Motion to Dismiss is at (A-18) and Brief in Support of Motion to Deny Motion to Dismiss at (A-20).

The ORDER in this case is final decision of The United States Court of Appeals for the Fourth Circuit who had jurisdiction based on 28 USC sections 1291 and 1294 (1).

Petitioner's Complaint alleged some of the violations of Petitioner's and her Principals' rights therein which took place in connection with the original case and also those complained of DURING TRIAL OF CASE NO 10607 (ALEXANDRIA CIRCUIT COURT) AND IN CONNECTION THEREWITH SAID LITIGATION IN THAT CASE. Additionally, Petitioner attached thereto thirty-four (34) admissible, relevant documents admissible to court in ;the original case to show the District Court that said original case could have been won as a matter of law and the laws were also a part of those exhibits. Petitioner felt this was necessary in order for the Court to believe Petitioner...she still wanted to believe that courts would act according to the facts ;and laws before them instead of cronyism misrepresentations , denial again of constitutional rights and conspiracy /invidious discrimination in favor of one's friends in the legal profession as is so obvious to the ordinary prudent person.

Petitioner also supplied such documents to substantiate her own and the positions of her Principals to the Circuit Court (Respondent Kent herein) in that trial, which is exactly why the jury's function was usurped by Respondent Kent and why the directed verdict was sought by Respondent Johnston herein, all contrary to the laws above cited and forbidden by same cited hereinbefore.

WHY WOULD RESPONDENT KENT (or any court) RULE COMPLETELY CONTRARY TO THE WEIGHT OF THE EVIDENCE BEFORE HIM? He can not say he did not believe the documents...most were either of record or official documents. The laws

do not permit for a directed verdict under these facts and their own knowledge told them they were violating said laws. WHY WOULD THE ATTORNEYS SEEK A DIRECTED VERDICT UNDER THIS SET OF FACTS? It was contrary to the facts to grant the \$7,000.00 judgment against Petitioner which documented proof of illegal acts by attorney Aschmann against his clients. His CLIENTS received the benefit of ONE letter in response to one Petitioner demanded he write the adverse party to learn what was supposed to be on the Bank's disclosure statement (that could not be read) which was of benefit to his CLIENTS (for which he had been paid over \$1,800.00. All other acts by Aschmann had benefitted the Bank and their attorneys ...not supposedly HIS CLIENTS.

SUCH CONDUCT BY ASCHMANN, AS WELL AS THE CONDUCT OF RESPONDENTS HEREIN DURING THE TRIAL AND LEADING THERETO IN CIRCUIT COURT WAS RECKLESS, MOTIVATED BY EVIL INTENT AND SHOWED CALLOUS INDIFFERENCE TO FEDERALLY PROTECTED RIGHTS OF PETITIONER AND HER PRINCIPALS.

It is the Petitioner's position that the very reason for the directed verdict request and granting thereof was because any ordinary prudent person who could read and understand the offered documents which should have been admitted and given to the jury (per rules of evidence) with proper instructions to the jury would have caused the jury to have found for Petitioner/Principals' favor. The Respondents also knew this and therefore, these acts were in furtherance of the conspiracy to deny Petitioner (and her Principals) their Constitutional Rights to a trial by jury and due process.

Since the overwhelming evidence was (is) on the side of the Petitioner, the directed verdict alone, is prima facia evidence of intent, and conspiracy to do wrong...to deny equal protection, privileges and immunities; discriminate against a paralegal (Petitioner) because she will not (in this instance yield to superiors who are determined to violate laws; said acts done while clothed with authority of state laws, under the color of State law (though contrary thereto also), to injure Petitioner and her Principals) financially from the Petitioner with a judgment of \$7,000.00 in favor of Petitioner's attorney, Aschmann, and EMOTIONALLY, because Petitioner is so well aware of the illegal acts by Respondents is also abuse of the United States Constitution and laws made in pursuance therewith...with knowledge that such is also happening to others in like circumstances, i.e. the abuse of Constitutions.

The Petitioner also filed a Counterclaim in West Virginia Circuit Court against Charles G. Aschmann, Jr., who is seeking to have the judgment granted by Respondent Kent herein, enforced in West Virginia (That Case may eventually come before THIS COURT also. (THAT COURT'S MOTHER DECIDED TO BUY STOCK IN THE BANK (F & M Inc) AFTER THE COURT HAD HAD THE CASE FOR ONE AND ONE-HALF YEARS... then recused himself after Petitioner pointed out how much influence the Bank had with the judiciary.)

Petitioner requests THIS COURT take judicial notice of all laws applicable hereto reading the evidence (documents) all of which are included herewith in the Appendix, at least all that Petitioner has received (been noticed with). Said documents are as follows:

A-1 Order denying rehearing by 4th Circuit.

A-2 Petitioner's Complaint.

A-10 Denial of Appeal, 4th Cir

A-11 Notice by Respondent Johnston of hearing to Dismiss (Dist Ct.)

A-12 Motion to Dismiss (Resp. Johnston).

A-14 Brief in Support thereof (Resp Johnston)

A-18 Motion to deny Motion motion to Dismiss (Petitioner).

A-20 Brief in Support thereof (Petitioner)

A-27 Transcript of Proceedings in District Court.

A-33 Order to Dismiss by District Court.

A-34 Motion for Reconsideration by Petitioner

A-35 Motion in Support thereof to District Court (A-34) by Petitioner

A-42 Motion to Reconsider denied by Order of District Court.

A-43 Notice of Appeal to 4th Circuit by Petitioner

A-45 Order to Proceed on Informal Brief by 4th Circuit

A-47 Disclosure of Corporate Affiliation and Financial Interest by Petitioner (None received from adverse party).

A-48 Informal Brief (Petitioner)

A-51 Informal Brief (Respondent Johnston).

A-53 Final Order by Respondent Kent in Case No. 10607

A-60 Petitioner Complaint in 10607

A-64 Petition for rehearing; petition for rehearing in BANC

The remaining appendices are to help show the original were not really prosecuted and the interest of the Petitioner and her Principals were not protected therein, either, by the applicable laws thereto, to

include Constitutional rights with jury trial being denied therein also.

ALSO PLEASE NOTE THAT RESPONDENTS BOWMAN NOR KENT NEVER DID ANSWER PETITIONER'S COMPLAINT HEREIN (only Respondent Johnston did) NOR DID RESPONDENT JOHNSTON FILE, or at least did not notice Petitioner with a copy of A DISCLOSURE of CORPORATE AFFILIATIONS AND FINANCIAL INTEREST. This shows another lack of EQUAL treatment for equal things...persons... equal protection, privileges and/or immunities.

SOME BACKGROUND FACTS

Ann S. Schrader prior to her death always lived in Winchester, Virginia and Petitioner also lived in Virginia for some years, but subsequently moved to West Virginia and had to drive on the average of three times per week to take care of Ann mostly in later years because of her inoperable heart condition. They support each other in deaths of husbands...and all bad as well as good. Due to the heart condition, Petitioner did just about all things for Schrader, knew and was trusted with all Schrader's personal business...Petitioner kept her secrets (heart problem) from her son (because she said he would use it against her if he learned of it (and he did) and when she decided to leave her last property to her grandson, she demanded **solemn promises from Petitioner that Petitioner must see to it that said Grandson was not cheated out of the property.** Knowing Schrader did not need stress, Petitioner promised. **Petitioner's common decency and integrity is now involved and she has as much interest in justice being provided as do her Principals, the Bart Whirleys.** Since Bart has known this Petitioner for most of his life and knowing how his Grandmother felt; and relied on Petitioner, it was only natural that he and his Wife would want to have Petitioner have power of attorney and take care of any legal problems especially, and other business problems they do not understand easily. and on January 7, 1984, the Power of Attorney was signed and is of record in Winchester, Virginia and Berkeley Springs, West Virginia .

Petitioner is the only person with all the knowledge concerning Schrader's affairs and the **only one** to try to see that the laws are applied to the facts.

Schrader owed a small First Deed of Trust to Farmers & Merchants National Bank Inc., when she died. She also owed about \$1,000 on a personal note to same bank. Her First Deed was \$6,667./00 (about) with payments of \$129.00 monthly. These payments the Bart Whirleys could

have handled nicely. However, Bart's Dad (Warren Fred Whirley) and the Bank were bound and determined to make money out of the property. **The Bank had knowledge that Schrader changed her will leaving the property to Bart (Petitioner personally informed the Bank Officer that both Ann and Petitioner trusted in November 1982 of the change...the terms of the life estate to Fred and the fact that Schrader knew Fred WOULD NOT live up to the conditional limitations of said will.)** Barry Walker (a roomer that had lived at Schrader's residence, who was the only other person Schrader told hardly anything to) and who had witnessed the valid will, informed Fred the day Schrader died, that he only had a life estate and that the property would go to Bart if Fred failed to do right. Therefore, both the Bank and Fred knew exactly what they were doing when they decided to loan Fred money and place a second deed of trust against the property. Fred never made one payment after receiving the loan on August 9, 1983 and never expected to repay one cent. On the other hand the Bank should have known He no longer had a job...was allergic to work anyway and always was, but the property would afford a fast \$50,000.00 profit and now we know a lot more because all around the property is going commercial.

To make a long story short, the Bank and Fred Whirley conspired to cheat Bart out of his inheritance, along with the help of others, some of which are lawyers., including the attorney who drew the last will, the Bank lawyers, etc. There is documented fraud and deceit. The Bank's lawyers coerced, threatened and scared Bart/Alice into assuming the second note/mortgage of \$27,717.60 on December 12, 1983 which Fred Whirley and the Bank placed on the property Bart already owned by laws of Virginia.

Petitioner retained three attorneys to prosecute and protect the interests of Petitioner and her Principals. **Petitioner's conscience would not ever let her have any peace of mind should she fail to return to her Principals what is legally theirs...and besides Schrader will haunt her also should she fail to do all she legally could do .** It shocks the conscience of ordinary persons when they learn of the acts of some officers of the courts as well as some of the Bank officers who are involved in this matter. It is unbelievable.

Petitioner retained first, David H. Savasten, Berkeley Springs, WV, who filed the original case. Virginia attorneys did not wish him to practice in Virginia with only associate license and with 21 days to amend, Petitioner was forced to retain Charles G Aschmann, Jr. (who would not associate with Savasten) Alexandria, Va., attorney (hoping

he would be far enough away from Winchester so as not be influenced by Bank, but NOT SO. In over 6 months time he was still not able to get a count on the attorney who had drew the will and negligent about probating it...had amended three times completely...constantly bickered with Petitioner about leaving out two of the attorney defendants...failed to do discovery FOR his clients...failed to answer discovery for the adverse party...allowed defense attorneys to almost destroy Bart Whirley on deposition concerning Schrader's death (he had found her dead and with his emotional state we were all worried about him anyway as his Dad KNEW of course and no doubt passed on the defense). With that act, Petitioner could not risk keeping Aschmann longer for fear that Bart would be past helping by anyone. After consulting with Principals very discreetly to protect Bart, we decided to dismiss Aschmann for cause. Petitioner wrote the letter and told him exactly why he was being dismissed.

Due to the time element, Petitioner was forced to return to Savasten and seek (again) co-counsel in Virginia which could not be completed in time...the court was mad, so the case had to be refiled, so the legal profession said. The real truth was (is) THAT judge also left a lot to be desired by an honest ethical judiciary, but that is another case.

Donald L Bowman, a Leesburg Virginia attorney became co-counsel with Savasten. During our working together it was decided that Savasten would take care of the case against Aschmann for his malpractice, but when the time was almost up (state of limitations due to Aschmann's deciding to sue for "HIS FEES" Savasten had not and would not file the case against Aschmann as promised, nor would Bowman, thus Petitioner was forced to so do, pro se. Bowman withdrew as her attorney to so allow.

Petitioner, in that case, 10607, Alexandria Circuit Court, also documented to the Court (Respondent Kent) that as a matter of law (as well as Aschmann's own words) the original case against the Bank could have been won. Thus, Aschmann would have gotten more money than he was granted by Respondent Kent had he acted properly. However since that case also was so well documented the only way to keep the Petitioner from winning with the jury, was to do as was done and keep the jury from doing their function...thus the directed verdict, abuse of power by Respondent Kent...a power Petitioner contends he no longer had, because of his own illegal acts in conspiracy with the attorneys to pre-determine the outcome of the case against Petitioner and for Aschmann.

Before the Court in the District Court are copies of the following:

1. Motion for Judgment(Counterclaim) Jury Trial Demanded by Petitioner and so did her Principals also ask for jury trial with Bowman still representing them.

2. Copies of pages 156 through 162 and 165 of transcript of trial in 10607 wherein Respondent Kent states "The whole case ought to be settled. I have no doubt about that. I have some suggestions along that line." and on page 156 says he will not discuss " On the record".(A-62) herein.

(Off record, Petitioner argued whe would take her chances with the jury before paying one dime to Aschmann for malpractice when the Court told her she did not know how the jury would vote). She hoped at that time that no one KNEW how the jury would vote.

On page 165 of said transcript Respondent Johnston is arguing against the jury getting the case with..."And I know if thise case goes to this jury this lady is going to argue the same opinions to the jury that she has argued to your honor"...(A-63) herein.

3. Final Order by Respondent Kent.(A-53) herein.

4. Copy of page of United States Constitution on which the Seventh Amendment appears thereon.

5 Copy of the page from Code of Virginia, Article 1, section111 Virginia Constitution...Re Due process of law; Obligation of contracts; Taking of private property; Prohibited discrimination; jury trial in civil cases . and ...jury trial..."ought to be held sacred"...

6. Copy of page 362, Chapter111, Code of Virginia , 8.01-336. Jury trial of right, waiver of jury trial..."The right of trial by jury as declared in Article 1, section 11, of the Constitution of this Commonwealth and by statutes thereof shall be preserved inviolate of the parties."

7. Copy of Code of Virginia 18.2-434. What deemed perjury, punishment and penalty.

8. Copy of page from 7A C.J.S., Attorney-Client re expert testimony not required...where the breach of duty..."or his failure to use due care is so clear or obvious that the triers of fact may find professional negligence from their knowledge"...

9. Copy of pages from C.J.S. Section 271-272 re issues for fact for the jury with 2 paragraphs of lists which included those complained of by Petitioner re Respondents herein, and included herein page 4.

10. A Notice page with attachments of exhibits which was intended to show District Court how illegal the original acts were in the orginial case ...that as a matter of law, WINABLE, but had been used in such a

way (if at all) to deny Justice to Petitioner and her Principals. Included therein were as follows:

a. Copy of affidavit drawn by Bank's attorney (Michael L. Bryan) and signed by Warren Fred Whirley on the day the Bank loaned Fred more money AFTER HE QUIT (documented) his job, wherein he stated all debts of estate paid – but untrue.

b. Copy of \$27,727.60 Note dated August 9, 1983 to the bank with attached disclosure statement that CAN NOT BE READ which Bart/Alice were coerced and threatened with foreclosure on property if they did not so sign on December 12, 1983. (One-third of which would have been over \$9,000.00 to Aschmann had he done his duties to his supposedly clients, the Petitioner /Principals instead of the Bank/judiciary.

c. Copy of Subpoena Duces Tecum in Case No 10607 obtained by Petitioner to get employment records of Warren Fred Whirley, because she KNEW he had very little since his wife died (November, 1983) Things really got worse for Schrader as far as Fred was concerned at that time...he constantly had his hand out and not one person to help Schrader when Petitioner was not present.

d. Copy of loan application of Fred to the Bank dated August 4, 1983. He still claimed to be employed, but Petitioner had warned the Bank it was not so. However Bank apparently did not care.

e. Copy of employment records of Fred showing last day worked as 6/7/83 and remark "He did not report for work when recalled from furlough" ...he "Quit" which he really did the moment his wife died but was actually at work the day Schrader died (she tried so hard to get him to keep his job) but as soon as she died, he really QUIT...her death date was January 13, 1983 (although Fred said in his affidavit hereinable referenced February 13, 1983 was the date of death.

f. Copy of Affidavit of Barry Walker who notified Fred that he had witnessed Will wherein Bart (Fred's son) was to get THAT property...Walker being the only person other than Petitioner loyal to Schrader who had knowledge of Valid Will besides Lake. Petitioner had told an Officer of the Bank when Elsie (Fred's Wife) had died in November, 1983 (again, as Schrader had instructed Petitioner once before to tell Mr Lake about the Will changed Valid Will) Schrader only suspected one officer of the Bank who she said was working with Fred and against her, but both she and Petitioner had full trust in Lake at that time and expected the Bank to do right, of course).

g. Copy of a page of a letter from one of the Bank's lawyers to

Aschmann (THE ONLY THING OF BENEFIT BY HIM FOR HIS CLIENTS) re what disclosure statement that could not be read supposedly showed. (The non-readable disclosure statement was a deliberate act on the part of the Bank and lawyers, because the Bank had personal knowledge that if Bart/Alice Whirley showed said disclosure statement to Petitioner who would have knowledge said disclosure statement was fraudulent because she handled so much of Schrader's business affairs for her. Examples; Schrader's funeral expenses, so says the letter of the disclosure statement which Alice told Petitioner was (and it shows) \$4,854.59 (with only \$2500.00 ever being paid by Fred...another; \$1,518.29 disclosure of other funeral expenses to Jones Funeral Home.

h. Copy of Funeral Bill from Ender's Funeral Home (only funeral home Schrader was ever at after her death) in the amount of \$3,742.20...total bill.

i. Copy of bill from Jones Funeral Home (for Elsie May Whirley, Fred's Wife) who died in November, 1982 before her mother-in-law who did not in any way obligate herself to those funeral expense, in the amount of \$1,601.24.

j. Copy of page from defense (Michael L. Bryan's Attorney) wherein he states in his answer at item 24 that Warren Fred Whirley personally only got \$662.74, "All other amounts advanced at closing were used for obligations of the estate of Ann Stipe Schrader which would have been claims against real estate which is the subject of this litigation." (According to their version of the disclosure statement that is not true. The mother-in-law is not obligated to pay for her daughter-in-law's funeral by any laws this Petitioner can find, which an attorney should have known...nor did the Bank ever get a copy of the REAL funeral bill that Petitioner knows of, but then they were loaning money to Fred (which they certainly had a right to do if they so desired, but it is hard to understand why when he could not buy a utility building from Sears because of bad credit) Petitioner now knows the said Bank also controls (maybe owns) the local Credit Bureau as well, so they must have had knowledge of same....The Bank did not have to worry about making disclosures to Petitioner's attorneys...but they were concerned if Petitioner learned of such disclosures...it was apparent that this was a fact from knowledge of the Petitioner (Incidentally, Petitioner also had a small checking account at the Bank at the time all this took place, but it did not take her long to close said account.)

k. Copy of Code of Virginia 64.1-136. Powers of Executor before qualification (which Bank nor attorney Wm. Mote never did, but Bank

did not refuse to act until AFTER obtaining Bart/Alice signatures on December 12, 1983.

l. Copy of Valid Will (A-55) herein.

m. Copy of statement of when taxes due showing when first half (6/5) and second half (12/5) taxes due on real estate of Ann S. Schrader (A-75) herein..

n. Copy of receipt showing that Warren Fred Whirley paid real estate taxes due 6/5 on August 22, 1983 (so as to be able to get loan of August 9, 1983). (A-76) herein.

o. Copy of Bart/Alice Affidavit re acts of December 12, 1983 (A58).

p. Copy of DEED OF GIFT drawn by Michael L. Bryan for Warren Fred Whirley dated December 12, 1983, deeding to Bart Whirley the property he already owned by Will of Schrader because Fred had failed to pay the taxes when due 12/5/1983. (per the Bank) when the Bank/lawyers got caught in their illegal acts, but when they were working WITH FRED to get the property (he never paid one payment after (or on) the SECOND deed of trust note, nor the first, after placing the SECOND) from Bart illegally, over two months late with taxes due 6/5 to 8/22 was not a forfeit by Bank.

q. Copy of part of a Motion in Limine, by Bank defense attorneys which Court and Petitioner's attorneys (Respondent Bowman herein, as well as Savasten) agreed to keep from the jury which was seeking to suppress relevant evidence as to when Warren Fred Whirley paid the taxes on 8/22/1983. However, that did not do the evil doers much good because Petitioner was able to get THAT truth out when she took the witness stand. Thereafter the Court in that case decided he would have to take the case from the jury, usurping that jury's function also...granted another motion to strike and dismissed that case also, with Petitioner's attorneys (both Savasten, and Respondent Bowman herein, going along with that decision and refusing to appeal the case.

r. Part of a copy of case law CAMP V. CLEARY (1882) VIRGINIA CASE re condition limitation of deed valid and "The condition of the deed is that the life estate shall not alien or attempt to alien and if he does the whole property vests at one in fee simple."

s. Copy of two pages of MEARS V. TAYLOR, 142 Va 824 (1925) which contains and states:

"That this was a conditional limitation and was valid. A limitation marks the period which determines the estate without any act on the part of him who has the next expected interest upon the happening of the perscribed contingency the estate

first limited comes at once to an end and the subsequent estate arises. A Conditional estate is therefore a mixed nature, partaking both of a condition and of a limitation, of a condition because it defeats the estate previously limited, and of a limitation, because upon the happening of the contingency the estate passes to the person having the expectant interest without entry or claim."

t. Copy of EDWARDS V. BRADLEY, (2 pages) 227 Va 224 (1984) which states: "Conditional limitations imposed upon a life estate is valid" and "Intention of testatrix must upheld"...**"IF NOT INCONSISTENT WITH ESTABLISHED RULE OF LAW."** (emphasis added). Will and Law says when estate passes not some executor so that statement in will inconsistent with law.

u. Copy of page from BROADDDUS V. BROADDUS, 144 Va 279 re wills "The statute law in Virginia requires a person in possession of a will to provide it is court for probate." YET none of Plaintiff's attorneys could seem to get a complaint filed against the attorney who drew the will(Mote) who had the original in his possession...who knew he was supposed to act the moment Schrader's eyes were closed in death, per her own instructions to him in the presence of Petitioner, Schrader also instructed Petitioner in his presence Mote that she was to notify Mote of her death. Petitioner did so within two hours of her death, but Mote failed to act, completely...Barry Walker sent Bart/Alice to Mote for the will when Fred placed the property on the market to sell in April, 1983. That is when Mote decided to refuse to administer the estate. Bart /Alice personally took will to be probated. in April, 1983.

v. Copy of April 25, 1983 letter from Clerk of Circuit Court (Michael Foreman) sending will back to property address where Fred Whirley lived and who forged his son's (Bart's) name to obtain same from the mails via certified receipt return.

w. Copy of Code of Virginia 64.1-94. Wills to be Recorder.

"Every will or authenticated copy admitted to probate by any court or clerk of any circuit court will be recorded by the clerk and remain in the clerk's office"

...(Petitioner happens to know the clerk and the attorney who drew the will (Froeman and Mote) go hunting together...or they did at that time) and in addition, attorney Mote also had (has) the Bank for a client, as does most of the attorneys in Winchester, Va.

IV ARGUMENT/DISCUSSION OF LAWS APPLICABLE

Virginia supposedly follows the Federal Rules of Civil Procedure

(so stated in Virginia's Rules.

Under **Anderson v Liberty Lobby, Inc.**, 477 U.S. 242, 91 L Ed 2d 202 (1986) THIS COURT said:

"Under Rule 50(a) of the Federal Rules of Civil Procedure, a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict if reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed."

And further on directed verdict—jury determinations, from **Anderson**, *supra*,

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary judgment or on a motion for directed verdict."

Both are applicable herein, since both summary judgment and directed verdict were mentioned in Respondent Kent's Final Order (A-91). This is in direct conflict with the actions of THIS COURT, but then, Respondent Kent does not have to answer apparently to anyone...at least these were the impressions given by Respondents.

Additionally, the Fourth Circuit Court of Appeals ruled against its own ruling of the past also. In **Garrison v. United States**, 62 F 2d 41 (1932) at 6, "Trial judge may not direct verdict against plaintiff, where there is substantial evidence supporting Plaintiff's case." Further at 8. "Directed verdict is proper only if there is no substantial evidence to support recovery, or where evidence is all against the plaintiff." This certainly was not the case herein at the Circuit Court level, NOR at District Court. Also Judge Parker in **GARRISON**, *SUPRA*, reminded the courts of the constitutional right to trial by jury when he also stated therein as follows:

"Where there is substantial evidence in support of Plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon the credibility."

Petitioner reiterates that the overwhelming evidence is on the side of the Petitioner in ALL CASES...THIS ONE AND ALL RELATED CASES. (The above is prima facie evidence of INTENT and CONSPIRACY, otherwise someone along the way would have caught such

blatant illegal acts, especially since Petitioner has tried to point them out to the proper people.

Although the District Court (as well as Respondent Kent in Case 10607) ignored Petitioner's pled (Complaint's) DEMAND of jury trial, (A-60) adequate access to court, due process, etc., District Court stated in the transcript at page (A-31) that "Insofar as 85(2) is concerned, it could probably stay—could probably be a claim" the Court went on to dismiss on the pretext that (per his statements) there was no proof of conspiracy alleged in the complaint. According to law, he could not dismiss under Rule 12, which he did, if there are any facts under which relief can be granted. **CONLEY V. GIBSON**, 355 U.S. 41, 78 S.Ct. 99, 2 L Ed 2d 80 and considering a motion to dismiss the factual allegations of the complaint must be accepted as true and all reasonable inferences must be made in favor of the plaintiff. **MITCHELL V. KING**, 537 F 2d 385. Furthermore, District Court and Circuit Court Respondent Kent could see for themselves from the exhibits (documents) filed in the respective cases, therefore, both knew the facts as pled were true. Additionally, District Court knew under 5 Wright & Miller, Federal Practice and Procedure, that motion to dismiss is generally looked upon with disfavor and rarely granted. (Section 1357, at 598). Further, there is not a requirement of a conspiracy element under 1983, only (1) violations of constitutional rights and (2) said violations take place under color of state law. **HAAG V. CUYAHOGA COUNTY** 619 F Supp 362 (1985). Both elements certainly were met at the Circuit Court and pled in Complaint in District Court herein, which the court admitted at (A-29) herein. Trial by jury denied in Circuit Court...jury trial is a Constitutional right (Seventh Amendment (and other laws applicable say the same). The Court usurped the jury function, clothed in the authority of the state by giving directed verdict/summary judgment all contrary to the overwhelming evidence before said courts. Jury trials demanded, not waived and the laws hereinabove cited state the facts were for a jury to decide and so does C.J.S. (herein quoted). A jury trial was a part of the due process due Petitioner (and all persons) and 7 Am Jur., section 4, says all lawyers have the duty to support the United States Constitution and the Constitution of the State, also hereinabove quoted. Said rights per the Constitutions were not forthcoming to Petitioner nor her Principals **EVER, IN ANY OF THE CASES, Including this INSTANT CASE.**

THIS COURT has said that a court can lose jurisdiction of the proceedings before it when such court fails to complete the court (which

Petitioner submits happened in Circuit Court). In **JOHNSON V. ZERBST**, 304 U.S. 458 Mr. Justice Black of THIS COURT stated:...

"A court's jurisdiction at the beginning of a trial may be lost "in the course of the proceedings" due to failure to complete the court, as the Sixth Amendment requires, by providing counsel for the accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of the conviction pronounced by a court without jurisdiction is void..."

This is a criminal case, but the Seventh Amendment should require the same treatment as the Sixth Amendment.

Also under Constitutional Law (Michie's Jurisprudence) page 477, it is stated: "The right to a fair and impartial trial in a civil case is as fundamental as it is in a criminal case." and cites **TEMPLE V. MOSES**, 175 Va 320, 8 S.E. 2d 262 (1940). Further from Michie's "Since a fair trial in a fair tribunal is a basic requirement of due process, it necessarily follows that a motion for a change of venue of escape a biased tribunal raise constitutional issues both relevant and essential". **HOLT V. VIRGINIA**, 381 U.S.131, 85 S.Ct. 1375, 14 L Ed 2d 290 (1965) (Which had to do with lawyers contempt charges, but surely the same can be applied here...OR SHOULD BE PROSECUTED SOMEHOW) and further on "due process requires that the accused receive a trial by an impartial jury free from outside influences."**UNITED STATES V. SAWYER**, 423 F 2d 1335 (4th Cir 1970). (Petitioner maintains that the Bank has placed all sorts of outside influences on her attorneys in the past, and in fact are still controlling same.

Further, to show the same due process is due in civil cases, it was stated in **BASS V. HOAGLAND**, 172 F 2d 205:

"We believe that judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterly by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money...The right of jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power".

There is a proper Judge in Virginia and in **BOYD V. BULALA**, 672 F Supp 915 (WD Va 1987) Federal District Judge Michael stated quoting Chief Justice Rehnquist in **Parkland Hosiery v. Shore**, 439 U.S.

332, 343, 99S.Ct. 654,657-58, 58 L. Ed 2d 552 (1979) dissenting;

"The founders of our nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, in might be added, to that of the judiciary."

(The history lesson that follows is certainly needed today and to continue with it,)

"In colonial America, the Crown's use of bench trials to circumvent the right to a jury was one of the chief grievances of those who advocated independence. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn L Rev. 639, 654 n 47 (1973) Among the oppressive acts cited in the Declaration of Independence are laws "depriving us, in many Cases, of the Benefits of Trial by Jury." The thirteen new American states all guaranteed the right to trial by jury in civil cases. In fact, "(t)he right to trial by jury was probably the only one universally secured by the first American state constitutions..." L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960) quoted in *Parkland Hosierey*, 439 U.S. at 341, 99S.Ct at 656 (Rehnquist, J., Dissenting)." The omission of the right to civil jury trial was one of the principal objections raised to the proposed Constitution in the ratification debates in the various states." Wolfram, *supra*, at 667-725. Among the arguments advanced for civil jury trials were "the protection of debtor-defendants; the frustration of unwise legislation; ...the vindication of the interests of private citizens in litigation against OVERBEARING AND OPPRESSIVE JUDGES". Wolfram, *supra*, at 670-71. *Emphasis added*). Ultimately, these arguments prevailed when Congress passed the seventh amendment in 1789 and VIRGINIA completed the ratification of the first ten amendments in 1791 (*Emphasis added*).

Isn't it ironic that Virginia should now be one of the states through some of their judges denying trial by jury in civil cases. Also please note what the Honorable Judge Michael stated on his own: ...

"This court earlier undertook to analyze the right to civil jury trials provided by the Virginia Constitution , in *Boyd V. Bulala*, 647 F Supp at 788-90. "The court concluded that the right to trial by jury guaranteed in Article 1, section 11, of the Virginia Constitution is equivalent to, or arguably stronger than, the right secured by the seventh amendment. *Id.*"

Finally, District Judge Michael rules: "Additur is prohibited under the seventh amendment because it would require a plaintiff "to forego his constitutional right to the verdict of a jury" and accept instead an assessment" partly made...by a tribunal which has no power to access.." quoting *Dimick v. Schiedt*, 292 U.S. at 487, 55 S.Ct. at 301.

Therefore , not all judges are like those complained of herein...who deny constitutional rights to litigants , discriminate, in favor of their cronies...abuse the Constitutions and the rights it provides for Petitioner and all. (Much of what herein pled also pled at lower Courts, in (A-35, A-64).

Since Mr. Chief Justice Rehnquist was quoted above re jury trials in civil cases, let us see what another member of THIS COURT had to say about WHEN the violations of the constitution takes place. Mr. Justice Stevens stated in his opinion in **DANIELS V. WILLIAMS** "The constitutional violation is complete as soon as the prohibited action is taken; " (106 S.Ct. at 678) " The independent federal remedy is then authorized by the language and legislative history of section 1983". Since this is true, the Circuit Court as well as the District Court both lost jurisdiction of the case before them and therefore their rulings should be null and void in their respective cases before them herein.

The Fourteenth Amendment "Due process " clause provides substantive due process which bars arbitrary action as hereinabove pled. Respondents conspired in such a way as to defeat Petitioner's rights in state court and was denial of equal protection of laws by persons acting under color of law by Respondents herein, as well as the District Court who said there was "probably a claim" under 85(2) (A-31) then proceeded to arbitrarily dismiss the Complaint. Petitioner submits that if her Complaint had been against anyone than a member of the judiciary, there is no doubt that Petitioner would have had a better chance at having her Complaint go forward to trial. **ALSO , PLEASE NOTE...same (A-31, District Court states...next paragraph..."For these reasons, the motion to dismiss will be granted. Of course, Judge Kent is immune and HIS MOTION TO DISMISS will be granted on that ground. (Emphasis added).**

Since Respondent Kent did not answer NOR put in a motion to dismiss (THIS COURT has all pleadings in THIS case in Appendix), pro se...and Counsel Locklin clearly states he's representing Respondent Johnston IN ALL HIS PLEADINGS (nor did Respondent Bowman answer nor file a motion to dismiss for himself and/or Respondent Kent); what does this tell us? Petitioner submits more ex parte,

conspiracy of a non-judicial nature HAD TO TRANSPIRE between Respondent Kent and/or someone and District Court. Such MOTION had to be a **verbal agreement, pre-determination** of the outcome of THIS CASE between Respondent Kent and/or someone and District Court Further, Petitioner not noticed IF SUCH MOTION sneaks into the file (as of this date) ...filing with THIS COURT.

Petitioner submits this is still more judicial cronyism, denial of access, invidious discrimination, taking of property without due process...in short, more of the same Constitutional and other substantive violations to Petitioner and the snowball gets bigger, with another furtherance act of conspiracy documented which impedes justice, etc., of 1985 (2) and (3).

(By the way, attorneys for Aschmann in West Virginia (who also work for the BANK) are still trying to take Petitioner's property...with an appeal to be filed by 30 June 1990 by Petitioner to West Virginia Supreme Court of Appeals, using a Writ of Execution for (1) and further, an additional action(2). There are Constitutional Rights laws applicable here also., and on the harassment goes against this Petitioner).

As pointed out to District Court, **RYLAND V. SHAPIRO**, 708 F 2d 967 (1983) tells us "State agents may simultaneously violate both substantive and procedural rights. 42 USCA Section 1983., Const. Amend 7, 14, and from same cite:

"Mere formal right to access to the courts does not pass constitutional muster, but rather, access must be adequate, effective and meaningful, and interference with access to courts gives rise to claim for relief under 1871 civil rights statute, 42 USCA Section 1983,

...AND AS IN **RYLAND**, supra, the acts complained of herein could be analyzed alternatively as conspiracy to obstruct justice" which no doubt District Court must have realized from his statement, herein.

Additionally, Respondents fall under **LYNK V. LA PORTA SUPERIOR COURT NO. 2**, 789 F. 2d 554 (7th Cir 1986) wherein it is stated:

"State's unreasonable refusal to allow federal question to be presented in its courts would be violation of the Supremacy Clause, which Supreme Court could rectify on direct review of state court's judgment. U.S.C.A. Const. Art 6, cl 2."

We can understand why. Under the Supremacy Clause/Oath of Office (Art 6) All judges are bound by said United States Constitution. Common sense tells us that failure to be so bound would mean loss of

jurisdiction...loss of power to proceed by any court who violated the provisions of the United States Constitution. First, a court does not have the power to perform or take jurisdiction of a matter until AFTER taking the oath of office...if he did so, any such act would be void because of failure to be sworn into office per the applicable laws thereto. The same must be true when a judge either fails (act of omission) to act (rule) per the Constitution; or denies (act of commission) substantive and procedural rights, thus losing jurisdiction because of violations, assumes powers he no longer has because power not granted to him per applicable laws; since such was breached by judge's own illegal acts per the constitutions he has sworn to support.

Speaking of an attorney(but must be applicable to judges)...“He has a duty to support the Constitutions and laws of the United States and the State” 7 Am Jur 2d section 4.

Petitioner submits that none of us have the right to violate another's constitutional rights...not only do our own oaths of office forbid it, such violative acts also makes one guilty of at least, by one's own conduct in such matter, false swearing in a material matter, i.e., the matter before him (in the case of a judge) or anyone else that so acts in relation therewith in connection with such activity of denial of violation of constitutional rights to another person.

Since such Constitutional provisions are mandatory and jurisdictional (Petitioner submits) not discretionary, it follows that no one would be immune from liability and is why Congress provided for liability under section 1983. “ To recover damages under federal civil rights statute, plaintiff must prove that he possessed a right, that he was deprived of that right, and that the deprivation was caused by action of a person acting under color of state law.” 42 U.S.C.A. section 1983. **SINGER V. WADMAN**, 595 F Supp 188 (1982), and **HAAG**, supra. **SINGER**, supra, also supports 1985 (3) in that the deprivation of rights caused injury to Petitioner via property (\$7,000.00) and emotionally, for the deprivation of rights and abuse of the United States Constitution, which she loves and thinks the greatest document ever written.

Further on immunity, in **BARGER V. STATE KANSAS**, 620 F Supp 1432 it is stated:

“ We have, however, consistently held that suits against officers in their individual capacities are not barred by the Eleventh Amendment, citing *Back v. Kansas University Psychiatry Foundation*, 580 F Supp 1216, 1220 (D Kan 1983).

“We have allowed such to proceed on the theory that when an

officer acts unconstitutionally, he is "stripped of his official or representative character and is subjected to the consequences of his official conduct." *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-54, 52 L.Ed 714 (1908) See also *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L Ed 2d 67 (1984)."

Further on immunity in **BEARD V UDALL**, 648 F 2d 1264 (1985) it is states:

"This court, relying on the Supreme Court's decision in *Stump v. Sparkman*, 435 U.S. 439, 98S.Ct. 1099, 55 LEd 2d 331 (1978) held that a judge does not enjoy judicial immunity if the judge's action were either non-judicial or taken in clear absence of all jurisdiction. *Rankin*, 633 F 2d at 850. See also *Loped V. Vanderwater*, 620 F 2d 1229, 1233...(1980). We then held that if Rankin's allegations were true, the judge would not enjoy judicial immunity...because of (1) the judge acted in the clear absence of jurisdiction; and(2) by agreeing in advance to grant the petition, he acted non-judicially,"

The same thing is true herein, since Petitioner can prove her allegations are fact the judge denied the constitutional rights, thereby violating the constitution and loss of jurisdiction and (2) there had to be a pre-determination of the outcome which is evidenced by the acts of the Respondents and failures to act, concerning the outcome that took place in the courtroom by the Respondents...i.e.,(1) denial of jury trial (2) Respondent Bowman's failure to argue FOR the jury to decide the facts, (3) Respondent Kent's failure to call upon Respondent Bowman to argue (4) Respondent Johnston frantic try to "cover-up" by extreme argument when in fact, Petitioner later learned that (5) the jury had already been sent home by Respondent Kent. These are all acts in furtherance of the conspiracy of the conspiracy leading to the end result...no jury trial for Petitioner and her Principals (all documented in transcript with the exception of sending the jury home while on break, said break being in transcript. (A-63) for part, herein.

ASHELMAN V POPE, 769 F 2d 1264 (1981) also supports Petitioner's position on immunity and "Defendants agreed beforehand to deprive him of his rights" is not a judicial act, by judge /prosecutor in that case and further states

"Both the judge and the prosecutor would be acting outside the scope of their official duties in entering into such an agreement. It is immaterial whether the conspirators' subsequent acts

pursuant to the agreement are within their respective scopes of authority, ...it is the prior agreement that is deemed the essential cause, thus, neither the judge nor the prosecutor would be shielded by immunity."

Petitioner argues that the same is true herein, neither are defense attorneys immune who pre-determine the outcome with the judge...the Respondents herein are just as liable as was the prosecutor and the judge in ASHELMAN, supra, said case being exactly on point herein.

Under the Rules of Federal Civil Judicial Procedure at Rule 7, says "There shall be a complaint and answer" and under Rule 8 effect of failure to Deny at (d) it is stated ""Averments in a pleading to which a responsive pleading is required, other than amount of damage are admitted where not denied in the responsive pleading." Since Respondents Kent and Bowman , herein, have yet to answer Petitioner's Complaint, we can deem they have admitted Petitioner's allegations in her Complaint are admitted as true by them. (If such had happened to anyone else, the court would have granted judgment by default, most likely...WHY NOT THESE TWO RESPONDENTS ALSO?) Counsel Locklin made it clear that he was (is) counsel to Respondent Johnston (A 49) and all certificates of service show him noticing Respondents Bowman and Kent, thus he obviously was not their counsel. The District Court took it upon himself to (in effect) act as defense counsel, it seems to Petitioner, therefore, there must have been some more of the same conspiracy going on in District Court...to ignore laws, discriminate invidiously against Petitioner and in favor of Respondents. ARE THESE PEOPLE ABOVE THE LAWS...The Fourth Circuit also upheld the District Court and made no mention of the TWO RESPONDENTS TO ANSWER THE COMPLAINT OF PETITIONER. Did ALL think Petitioner would not notice or pick up there was not answers from them? SHE DID NOTICE. She expects (and has the right to expect) the same laws (treatment) applied to them as to anyone else. GILLISPIE V. CIVILETTI, 629 F 2d 637 (1980) states;

"Section 1985...is derived from the Thirteenth Amendment and covers all deprivations of equal protection of the laws and equal privileges and immunities under the laws regardless of its source." See Griffin v. Breckenridge 403 U.S, 88, 91 S.Ct. 1790, 29 L Ed 2d 338 (1971) (private acts cognizable under section 1985 (3) ; Williams v. Wright, 432 F Supp 723 (D Or 1976) acts of federal officers can violate section 1985)."

Petitioner begs THIS COURT to take judicial notice of these laws, please.

V. CONSTITUTIONAL RIGHTS VIOLATED DUE ALL AT CIRCUIT COURT LEVEL.

Petitioner argues that her Constitutional rights as pled hereinabove and those same rights of her Principals were violated at the Circuit Court level in Case No 10607 before Respondent Kent...further same is documented as stated herein.

VI DISTRICT COURT 'S VIOLATIONS OF RIGHTS

Petitioner submits that the District Court also violated her Constitutional right to access to court ...to petition for redress with meaningful access, that apparently he also conspired with the Respondents re Judge Kent's Motion to dismiss, and it certainly was not a part of his official judicial job to (in effect) defend Respondents Kent/Bowman and be negligent about noticing they had not answered Petitioner's Complaint. Had they had a complaint against Petitioner, it is doubtful that the District Court would have failed to notice if Petitioner had not answered their complaint, per his own statement of "probably a claim."

VII. PETITIONER HAS A CONSTITUTIONAL RIGHT TO BE PROTECTED FROM ILLEGAL ARBITRARY ACTION

Petitioner contends that the act of denying a trial by jury was an arbitrary one by Respondent Kent herein (with the aid of the other two Respondents) and that the hereinabove pled cite by Mr. Chief Justice Rehnquist precludes and FORBIDS any court denying trial by jury in a civil action where demand has been made and not waived, as herein. Further, District Court could not dismiss under Rule 12. He said himself the case..."could probably stay" (A-31) and 1983 elements necessary for cause of action was also met; thus Petitioner has the right to expect Courts to grant her the right to petition in a meaningful way for redress.

VIII. CONCLUSION

It should be remembered that not only is the Petitioner's welfare and rights at stake herein, (and those of her Principals) but so are the people's in connection with the Bank as well as the judiciary. The Constitutions and statutes are supposed to apply to all, and to all alike under said laws...THAT DID NOT HAPPEN.

The Writ of Certiorari should be granted because the Fourth Circuit has denied this appeal in direct conflict with previous decisions by that same court involving the exact same act(directed verdict) by a lower court. This decision by the Fourth Circuit is also in conflict with decisions by other Appeals Courts concerning same questions such as immunity and jurisdiction as herein cited. The Fourth Circuit has,

thusly, far departed from the accepted and proper course toward justice not only for Petitioner but apparently the rights of the public.

Additionally, the Writ should be granted because State Circuit Courts has ignored and thereby decided important questions of federal law, (apparently simply because they thought they can get away with it) whatever, their reasons, such decisions are contrary to previous decisions of THIS COURT, and also contrary to Federal Appeals Courts which once again, should be settled and reiterated by THIS COURT, since both VIRGINIA and WEST VIRGINIA (and others from what Petitioner is told) have forgotten that back in 1878 in **CLARKE V. TAYLOR**, 71 Va (30 Gratt) it was stated:"

"In our complex form of government, the courts are bound to have respect for, and take cognizance of, the federal as well as the state constitution, in fact, to regard the former as the supreme law, which invalidates—renders null and void— any law of the state violating it."

Of course the **LAW OF THE STATE** did not violate...those clothed **with authority** of the state law did the violating, not only of the Supremacy Clause, the Constitutions but also the State Laws...thus said individual and conspiracy acts invalidates and renders null and void such said acts, orders and/or judgments. Additionally on District Court, he more than erred...he protected (in effect) the two Respondents who did not bother to answer Petitioner's Complaint as well as denying access to court to seek redress for grievances...dismissing the case in their favor **when they did not even so plead**, at least not in court like others...they must have done so in private in conspiracy with the District Court.. This does not reflect "good behavior" ...does it?

Petitioner- implores THIS COURT to grant the Writ and take corrective and instructive action and send a message to many, many, many individuals that our **CONSTITUTIONS** are not to be ignored or violated by those that are supposed to administer and support same in accord thereto, but if they do so do, they do so at their peril. and will have to pay legally someone, someway, somehow.

Respectfully submitted,

Marie M. McMahon

Marie M. McMahon, pro se

103 Pratt Street

Berkeley Springs, WV 25411

(304) 258-1117



IX
APPENDIX

APPENDIX

PAGE

4th Circuit Denial of Reconsideration	A-1
Complaint to District Court by Petitioner	A-1
4 th Circuit Court affirmed District Court Order	A-10
Notice to Dismiss at District Court by Respondent Johnston	A-11
Motion to Dismiss by Respondent Johnston	A-12
Brief in support thereof by Respondent Johnston	A-14
Motion to Deny Motion to Dismiss by Petitioner	A-18
Brief in support thereof by Petitioner	A-20
Transcript of Proceedings in District Court	A-27
District Court Order to Dismiss	A-33
Motion for Reconsideration, District Court, Petitioner	A-34
Memorandum in Support thereof Petitioner	A-35
Order of District Court Denying Reconsideration	A-42
Notice of Appeal to 4th Circuit by Petitioner	A-43
Order by 4th Circuit to proceed on Informal Brief	A-45
Disclosure of Corp. Affil. & Fin Ints. (by Petitioner)	A-47
Informal Brief by Petitioner	A-48
Informal Brief by Respondent Johnston	A-51
Final Order by Respondent Kent in Case No. 10607	A-53
Last Will and Testament of Ann S. Schrader	A-55
Affidavit of Bart/ Alice Whirley	A-58
Complaint of Petitioner in Case No. 10607	A-60
Respondent Kent's " Not on record" from transcript 10607	A-62
Respondent Johnston's Argument (trans pg) "if it goes to jury"	A-63
Petition for Rehearing and Rehearing in Banc to 4th Cir	A-64
City of Winchester's Showing when taxes due	A-74 <i>5/17/22</i>
Receipt copy showing when Warren Fred Whirley paid taxes ...	A-74 <i>6/2/22</i>

ATV 24
5.10.21

IX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No.89-2657

MARIE M. MCMAHON,
Plaintiff, Appellant

v.

DONALD H.KENT, JOHN H. JOHNSTON,
DONALD L. BOWMAN,
Defendant, Appellees

Filed Mar 19, 1990

—
On Petition for Rehearing with Suggestion for Rehearing in Banc
—

The appellant's petition and suggestion for rehearing in bank were submitted to this court. As no member of this Court or the panel requested a poll of the suggestion for rehearing in banc, and

As the panel considered the petition and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with Concurrence of Judge Murnaghan and Judge Wilkinson.

For the Court
John M. Greacen, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

Civil action No. 89-0173-A
JURY TRIAL DEMANDED

MARIE M. MCMAHON,
Plaintiff, attorney-in-fact,
103 Pratt Street
Berkeley Springs, WV 25411

v.

DONALD H KENT
520 King Street, 4th Floor
Alexandria, Virginia 22314

JOHN H. JOHNSTON
3026 Javier Road
Fairfax, Virginia 22031

DONALD L BOWMAN
11 West Market Street
Leesburg, Virginia 22075
Defendants.

CONSTITUTIONAL AND CIVIL RIGHTS COMPLAINT

I. Jurisdiction

1. This court has jurisdiction of this action pursuant to 28 U.S.C. Section 1332. There is complete diversity between the parties and the matter in controversy exceed \$10,000.00 exclusive of interest and costs. Additionally this Court has jurisdiction pursuant to 28 U.S.C. Section 1343, 42 U.S.C. 1983 and 1985.

II. Parties

2. Plaintiff, Marie M. McMahon, is a citizen of the State of West Virginia.

3. Defendant, Donald H Kent, resides in Alexandria, Virginia, and has his office at 520 King Street, 4th Floor, as a Circuit Court Judge.

4. Defendant, John H. Johnston , resides in Annapolis, Maryland, and practices law in Virginia with offices in Fairfax, Virginia; a member of the SLENKER, BRANDT, JENNINGS AND JOHNSTON law firm.

5. Defendant, Donald L. Bowman, resides near Leesburg, Virginia and it an attorney practicing law in Leesburg, Virginia.

III. Nature of the Action

6. This is an action for monetary relief from the gross, wanton, willful, reckless disregard and violations of both Virginia and United States Constitutions, Virginia Statutes and other applicable laws which Defendants knowingly, with intent and malice knew by these same laws, rules and oaths of office had a duty-owed responsibility to support, uphold and comply with, all to the Plaintiff's injury.

IV. Facts

7. Plaintiff retained Alexandria, Virginia Attorney Charles G. Aschmann, Jr., to prosecute Case No. 84-L-89 (Winchester Circuit Court, Winchester , Virginia. Defendants were Farmers and Merchants National Bank, Inc., various Bank officers, three Winchester Attorneys and another individual. Plaintiff's Principals (as well, clients of Aschmann) were Bart And Alice Whirley.

8. Instead of prosecuting, in almost seven months Aschmann produced ONE LETTER that was beneficial to his clients. He was paid over \$1,800.00; he billed over another \$7,000.00. The time he kept on his time sheets evidently was spent to the detriment and injury of his clients emotionally and financially, partly as follows:

a. He was allowed to amend fully twice and a third time for one defendant which subsequently had to be done again by a subsequent attorney.

b. Mr. Aschmann failed to answer discovery of defendants, causing his clients to be censured..\$666.00...paid by Plaintiff.

c. Mr Aschmann did not get out discovery FOR his clients though furnished some written questions and information to use therefor by Plaintiff.

d Mr. Aschmann failed to use Rules of Civil Procedure for benefit of his clients.

e. Failed to file a pleading to have funds under control of Court released to clients.

f. Filed fraudulent claim for pay against his clients...which case he never intended to prosecute, per his actions. He only

wanted the position of being on record in case, for his own personal reasons.

g. Aschmann could have won said case, per applicable laws had he properly prosecuted said case and have received more money from contingency fee than he sued his clients for in his case Alexandria Circuit Court No. 10607.

h. Because of Aschmann's malpractice 84-L-89 was non-suited and a new case had to be filed, 85-L-142; said filing by David H Savasten.

9. When Savasten failed to file the malpractice action against Aschmann, this Plaintiff was forced to do so, pro se, with only about three hours before deadline to file.

10. Defendant Bowman, therein, was co-counsel with Savasten...when Savasten failed Plaintiff, turned to Bowman (both being paid as attorney-client relationship by Plaintiff) for his help to dictate the complaint for counterclaim against Aschmann which was desperately needed by Plaintiff because she was so emotionally upset with Savasten who had promised Plaintiff he would take care of the Malpractice action against Aschmann. Bowman knew...he heard Savasten make that statement...both now deny it, but are not telling the truth..which both very well know of their own knowledge...They have excellent memories.

11. Defendant Bowman would only defend Plaintiff in the case (10607) he would not prosecute...it is against his policy to do so he stated. He did dictate most of the wording in Plaintiff's Counterclaim (Exhibit I)

12. Defendant Bowman and David H. Savasten were co-counsel in the new case filed by Savasten (85-L-142) replaced 94-L-89, Winchester Court, against F & M et al.).

13. During the course of prosecution of 10607 Defendant Bowman represented the Bart Whirleys in defense of Aschmann (who sued all three of us) he(Bowman) tried to get Plaintiff to allow him to settle the dispute between Aschmann and Plaintiff with the suggestion that both "Walk away, neither paying anything" but none of his clients wanted this after what Aschmann had done because of the various damages ...to all three of his clients.

14. Defendant Johnston represented Aschmann in Case No 10607. There was a telephone conference between Plaintiff, Johnston and Judge Haddock wherein Plaintiff overheard Judge Haddock ask Johnston if he was really going to let the case go to trial. It was about this time

that Bowman made one of his speeches as reflected in item 13 above. Bowman suggested such much more than once.

15. During the prosecution of 10607, Defendant Kent denied Plaintiff the opportunity to amend her pleadings (complaint) ONE time. It was pled by Plaintiff that Aschmann had amended three times, having almost three months to amend initially, yet Plaintiff could not amend once with only three hours to prepare complaint. Where was the fairness and/or equal treatment for equal things, as well as a non-lawyer vs. a Yale Law School Graduate with 30 years of experience. This was also impeding justice and in effect, denial of access to court...“Any deliberate impediment to access, may constitute a constitutional deprivation.” Jackson v. Procnier 1899 F 2d 307 (5th Cir 1985) at page 311. At this stage of the proceedings there is no doubt that it was deliberately done to harass this litigant.

16. Defendant Johnston and Kent also refused to admit relevant evidence and rather than argue about it Defendant Kent suggested the case should be settled, but would not discuss settlement on record. (Exhibit 2, transcript pages 156, 157)

17. Off record, Defendant Kent pressured this Plaintiff to settle it because “You do not know how that jury will vote”...whereupon Plaintiff stated she would take her chances with the jury before paying one dime for Mr. Aschmann’s malpractice...she felt the documented evidence supported her position if she could get the documents admitted. However, the jury was never to see some.

18. Another unequal treatment to Plaintiff’s Principals this time, was that in the “off record” conference/ arguments, Mr. Aschmann was allowed in with his attorney but the Bart Whirleys were not invited in with their attorney...they had as much right to be included with their attorney as did Mr. Aschmann. Plaintiff was pro se.

19. Plaintiff excused herself and went to make copies of instructions for the jury (which Defendant Bowman and Plaintiff had added on at lunch hour) and apparently Defendant Bowman had gone to the restroom; Plaintiff also excused herself to do the same since later back on record we were waiting so long for Bowman.

20. Back on record, there was no further arguments concerning evidence documents being admitted..instead Defendant Johnston was allowed to go into his motions arguing against the jury deciding the facts. (Exhibit 3, page 157 transcript).

21. Contrary to the overwhelming evidence on the side of this Plaintiff, the fact reasonable minds could differ; the right to trial by jury

preserved by the Virginia Constitution and the United States Constitution; the Virginia Statute (8.01-336) and all defendants herein having knowledge of same, Defendant Kent rendered a directed verdict (which per the above he could not do) as well as other applicable laws. Such acts were also in violation of these conspirator's oaths of office. (Plaintiff had made it clear that she wanted a jury verdict. (See Exhibit 3 for Final Order).

22. It was clear to Plaintiff the illegal acts of item 21 above was done with the intention to injure this Plaintiff. When she raised her hand to be allowed to argue, Defendant Kent, instead, just noted her exception...Defendant Bowman said nothing to protect his clients constitutional rights, but evidently that had been taken care of with the plan for the non-suit against the Bart Whirleys, which certainly never should have been filed in the first place...none of us received any benefit except the one letter, which contents Plaintiff already knew but could not prove until that illegal acts was cleared up. (Said letter reflected what the disclosure statement from the Bank should have, done on purpose because Bank knew Plaintiff would know the disclosure statement to be fraudulent.

23. The transcript of 10607 leaves a lot to be desired since it is inaccurate...leaves out certain statements by this Plaintiff of which she is certain. She was excused to go to the restroom thinking she would be back by the time Defendant Bowman was, but transcript does not ever show her returning...just shows arguing later on (transcript pages 157 and 1162. Transcript does show conspiracy.

24. The defendants "under color of state law" acted together with never an intention to allow the jury to do their job conspiring to deny Plaintiff of her constitutional and civil rights which was an impediment and obstruction of justice. It was a single plan shared by all Defendants to deny any possible justice by the jury. Each played their parts individually and collectively when necessary, defendant Bowman deliberately left out of his dictation of the complaint the words WILFUL, WANTON, RECKLESS, to aid against damages which certainly should be forthcoming to all Aschmann's clients; Defendant Kent denying amendment; Defendants Johnston and Kent (no doubt aided by Aschmann and Bowman) to refuse trial by jury (knowing all three of Aschmann's clients desperately wanted jury trial Defendant Kent's directed verdict depriving Plaintiff of property by said illegal acts cited hereinabove. All knew Plaintiff wanted trial by jury.

25. Each Defendant knowingly with intent and malice played their

role in the above and are liable jointly and severely.

26. Attorneys Aschmann and Savasten herein mentioned can not be parties in this suit at this time. Each are litigants in other cases but it is necessary to file because of the statute of limitations, it is believed. Mr. Aschmann is trying to collect his illegal judgment in West Virginia. Said judgment is in fact, void, Defendant Kent having lost jurisdiction for failure to complete the court and denial of constitutional rights, per the United States Supreme Court in case law.

27. All officers of the courts who have done wrong and been illegal in these related cases have so acted for the benefit of Farmers and Merchants National Bank and fellow officers of the courts. Said acts, are, in addition to the above pled, harassment and malicious prosecution of the Plaintiff out spite because she caught the original illegal acts by said Bank, et al, and because she possesses the integrity to act in support of her duty-owed fiduciary responsibility to her Principals, which is the same for her under both Virginia and West Virginia statutes as it is for each attorney. Thus, she has the duty by statute to so act as well.

28. Defendant Kent was not acting in official capacity when taking part in conspiracy to deny Constitutional rights, thus he is not covered by immunity, per case laws. *Beard v. Udall*, 648 F 2d 1264 (6th Cir 1981) *Ashelman v. Pope*, 769 F 2d 1360 (1985) page 1362.

29. Exhaustion of state remedies are not necessary where violations of sections 1983 and 1985 are concerned. *Clark v. Yosemite Community College Dist.*, 785 F 2d 781 (1986) and *Alacare, Inc. North v. Baffiano*, 785 F 2d 963 (1986).

V. Causes of Action

30. Plaintiff hereby incorporates paragraphs 1 through 29 above as though fully set forth herein.

31. The conduct of the Defendants as complained of herein, renders them liable, jointly and severally to Plaintiff for damages sustained as a result of said conduct pursuant to 42 U.S.C. Sections 1983 and 1985.

32. The conduct of Defendants, as complained of herein has caused Plaintiff to suffer mental anguish, pain and suffering and will continue to cause pain and suffering because of the deprivation of Constitutional rights all a result of Defendants actions constituting gross and willful disregard to Plaintiff's rights and the disregard by Defendants of their Professional obligations to Plaintiff and others like her (her Principals).

VI. Prayer for Relief

33. WHEREFORE, Plaintiff seeks the following relief:

- a. An award of actual damages of \$6929.34.
- b. An award of compensatory damages in the amount of Fifty Thousand Dollars (\$50,000.00).
- c. An award of punitive damages in the amount of Three Hundred Thousand Dollars(\$300,000.00).
- d. Plaintiff's costs
- e. Such other relief as this Court deems just and proper.

Respectfully submitted.

S/ Marie M. McMahon.
Marie M. McMahon
103 Pratt Street
Berkeley Springs, WV 25411
(304) 258-1117

State of West Virginia
County of Morgan, to wit:

I, Marie M. McMahon , Plaintiff herein, hereby state the foregoing facts are true and correct to the best of my knowledge, and belief, and to the extent based on information, they are true and correct to the best of my knowledge and belief.

S/ Marie M. McMahon
Marie M. McMahon, pro se

Taken, sworn to and subscribed before me a Notary in and for the county abovesaid this 8th day of February, 1989.

S/. Madeline Dunham,
Notary Public

My commission expires Mar 5, 1996.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I have mailed a true copy of the foregoing Complaint with attachments by U.S. Mail, Certified, Return Receipt, this 8th day of February, 1989, to the following Defendants in the foregoing Complaint. True copies were sent to:

Donald H. Kent
520 King Street, 4th Floor
Alexandria, Virginia 22314

John H. Johnston
3026 Javier Road,
Fairfax, Virginia 22031

Donald L. Bowman
11 West Market Street
Leesburg, Virginia 22075

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Street
Berkeley Springs, WV 25411
(304) 258-1117

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 89-2657

MARIE M. MCMAHON
Plaintiff/Appellant

v.

DONALD H. KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants/Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr. Chief District Judge. (C.A No. 89-173-A)

Submitted: December 27, 1989 Decided: February 27, 1989

Before HALL MURNAGHAN, AND WILKINSON,
circuit judges

Marie M. McMahon
Appellant pro se

Kevin Lee Locklin
SLENER, BRANDT, JENNINGS & JOHNSTON,
for Appellee Johnston.

PER CURIAM:

Marie M. McMahon appeals from the district court's order denying relief in her civil rights action brought under 42 U.S.C. Section 1983. Our review of the record and the district court's opinion discloses that this appeal is without merit. The district court correctly found that Judge Kent is absolutely immune from suit under section 1983 for the judicial acts which are the basis of Ms. McMahon's claim. Her claim against the remaining two defendants, both lawyers, also fail because their actions in a prior civil dispute do not provide any support for her claim that they conspired to deprive her of a jury trial. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid in the decisional process. **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-0173-A
MARIE M. MCMAHON
Plaintiff

v.

DONALD H. KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants

NOTICE

PLEASE TAKE notice that on February 24, 1989, at 10:00 a.m. or as soon thereafter as counsel may be heard, counsel for defendant John H. Johnston will move this Court for a Hearing on the attached Motion to Dismiss.

S/ John H. Johnston
John H. Johnston
By Counsel

SLENER, BRANDT, JENNINGS & JOHNSTON
By: S/ Kevin L. Locklin
Kevin L. Locklin
Counsel for Defendant Johnston

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, postage prepaid, this 17 th day of February, 1989, to: Marie m. McMahon, 103 Pratt Street, Berkeley Springs, WV 25411; Donald H. Kent, 520 King Street, 4th floor, Alexandria, Virginia 223314 and Donald L. Bowman, 11 West Market Street, Leesburg, Va. 22075

S/ Kevin L. Locklin
Kevin Locklin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
Alexandria Division

Civil Action No. 89-0173-A

MARIE M MCMAHON
PLaintiff

v

DONALD H. KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants

MOTION TO DISMISS

Comes now Defendant John H. Johnston, by Counsel, and files this his Motion To Dismiss Plaintiff's Complaint pursuant to Rule 12, of the Federal Rules of Civil Procedure and in support thereof states as follows:

1. The Plaintiff has failed to state a cause of action upon which relief may be granted.

2. The Plaintiff has failed to state sufficient facts which would permit a cause of action under 42 U.S.C. Section 1985 as there is no discriminatory animus pled; nor sufficient facts to support a conspiracy claim. The Plaintiff, as a matter of law, has failed to state a cause of action under 42 U.S.C. section 1983 as defendant Johnston was acting as defense counsel in a civil action which was pending before the Honorable Donald H. Kent in the Circuit Court for City of Alexandria in the Commonwealth of Virginia. There are no facts pled which would establish that Mr. Johnston was acting under color of state law at the time of the alleged infraction.

4. The mere fact that Mr. Johnston as defense counsel, made a motion for a directed verdict to the Plaintiff's case in chief and further objected to evidence which he believed not to be admissible does not form a basis for constitutional violations.

5. This action is further barred by the applicable statute of limitations.

ACCORDINGLY, FOR THE REASONS STATED HEREIN this Motion is proper and defendant John H. Johnston moves that this action be dismissed with prejudice and that he be awarded reasonable attorney's

fees and costs in having to defend said case.

S/ John H. Johnston
John H. Johnston, by Counsel

SLENKER BRANDT, JENNINGS & JOHNSTON,
By: S/ Kevin L. Locklin
Kevin L. Locklin, Counsel for Defendant Johnston

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed, postage prepaid, via both regular and certified mail, this 17th day of February, 1989, to Marie M. McMahon, 103 Pratt Street, Berkeley Springs, WV 25411, plaintiff, pro se; Donald H. Kent 520 King Street, 4th floor, Alexandria, Va 22314, defendant; and Donald L. Bowman, 11 West Market Street, Leesburg, Va. 22075, Defendant.

S/ Kevin L. Locklin
Kevin L. Locklin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No 89-173-A

MARIE M. MCMAHON
Plaintiff

vs

DONALD H. KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now defendant John H. Johnston, by counsel, and files this his Brief in Support of his Motion to Dismiss pursuant to Rule 12, Federal Rules of Civil Procedure, and states as follows:

INTRODUCTION

THE Plaintiff in this action, appearing per se, alleges violations of both United States and Virginia Constitutions as a result of action taken by the defendants in the Circuit Court of the City of Alexandria in the Commonwealth of Virginia. The Plaintiff had files filed a Counterclaim against Charles G. Aschmann, Jr., alleging a breach of contract. In sum, the case sounded in legal malpractice against her counsel as a result of representation that Mr. Aschmann had provided to her.

BRIEF IN SUPPORT OF MOTION TO DISMISS

At the trial of this matter before the Honorable Donald Kent the Circuit Court Judge for the City of Alexandria, John H. Johnston appeared as ad defense counsel for Aschmann (See exhibits to Plaintiff's Complaint.

Acting as defense counsel for Mr. Aschmann, Mr. Johnston made an objection to Plaintiff's efforts to make cannons of ethics exhibits in the underlying trial (see Exhibit 2, Plaintiff's Complaint) There after, defendant Johnston made a motion for directed verdict against the counterclaim filed by Ms. McMahon to which, after hearing oral argument, the trial court sustained (see exhibits 2, Plaintiff's Complaint,

As a result of this, the plaintiff now files a claim pursuant to 42 U.S.C. Sections 1983 and 1985 claiming constitutional violations by all

defendants.

ARGUMENTS AND LAW

a) 42 U.S./C. section 1985

The Plaintiff seeks relief pursuant to 42 U.S.C. section 1985. The plaintiff in her Complaint fails to assert specifically which subparagraph of section 1985 she is proceeding upon. Be this as it may a review of section 1985 establishes that the Plaintiff has no viable cause of action as a matter of law either pursuant to Section 1985 subpart 2 or subpart 3.

As to any cause of action under Section 1985 (2) the only facts as alleged to defendant Johnston is that the objected to relevant evidence, disallowing its admission into evidence before a jury (Complaint, paragraph 16) and that defendant Johnston was permitted to make a motion for a directed verdict, thereby depriving the jury of hearing the case (Complaint, paragraph 20). The plaintiff states in her Complaint (paragraph) 23 and attached transcript pages 157-162) that the defendants acted in furtherance of a conspiracy and she further makes the conclusory allegation (in paragraph 24 of the complaint) that the defendants acted under the color of state law with the intention to conspire to deny the plaintiff her constitutional and civil rights which were an impediment and obstruction of justice (paragraph 24, Complaint).

The Plaintiff has failed to state specific facts which would permit a claim for conspiracy claim under Section 1985. The Plaintiff utilizes broad sweeping allegations of conspiracy which are vague and inconclusive. A further review of the transcript pages referred to by the Plaintiff establishes that there was no conspiracy to deter by force, intimidation or threat to deprive the plaintiff from testifying freely, fully and truthfully as to her claim. Her only allegation is that the court wrongfully granted a motion for a directed verdict as made by defendant Johnston. This of itself does not establish a conspiracy nor form a violation of a constitutional right.

As to section 1985 (3) the Plaintiff has failed to allege any racial or class based invidiously discriminatory animus by defendant Johnston. See , Griffin v. Breckenridge, 403 U.S. 88, 91S.Ct. 1790 (1971); United Land Corp. of America v. Clarke, 613 F. 2d 497, 501 (4th Cir 1980).

b) 42 U.S.C. Section 1983 claim.

Plaintiff's cause of action against defendant Johnston under Section 1983 is again premised upon his acting as defense counsel for an adversary against her claim in the City of Alexandria Circuit Court. Her allegations are simply that defendant Johnston made objection to

relevant evidence and further made a motion for a directed verdict which was granted by Judge Kent during the trial proceedings, thereby refusing a trial by jury. 42 U.S.C. section 1983 provides that a person acting under color of state law who deprives an individual of rights, privileges or immunities secured the the constitution and laws shall be liable to the person injured. A review of the Complaint as pled by the Plaintiff fails to establish that defendant Johnston was acting under the color of state law in paragraph 24 of her complaint. However, it is well established that a privately retained counsel acting on behalf of a party in a civil action is not acting under color of State law. See **Deas v. Potts**, 547 F 2d 800 (4th Cir 1976).

Furthermore, the Complaint as pled fails to establish with specificity any conspiracy whereby the Plaintiff could possible include defendant Johnston within the umbrella as action under color of state by being a willful participant in a joint action with Judge Kent. See **Dennis v. Sparks**, 449 U.S. 24, 101 S.Ct. 183 (1980)

It is abundantly clear from review of the attachments to Plaintiff's Complaint that she is simply dissatisfied with the ruling of the court in dismissing her counterclaim against Aschmann. The mere fact that a judge , be it right or wrong, makes a decision that a case cannot go forward based upon insufficiency of evidence does not form a cause of action under the Seventh Amendment of the United States Constitution. In this particular action, defendant Johnston has no culpability of the joint or conspiratorial action with Judge Kent. See, **Phillips V Ashburn**, 746 F 2d 781 (11Cir 1984), as the pleadings must specifically present facts tending to show agreement and concerted action. See **Generally Sooner Prods. V. McBride** 708 F 2d 510, 512 (10th Cir 1983). Furthermore, it is well established that parties, lawyers and witnesses to a State Court do not become state actors merely because of their participation in a judicial proceeding See **Barnard v. Young** 720 F 2d 1188 (10th Cir 1983) **Fleming v. Moore**, 780 F 2d 438 (4th Cir 1985)

Accordingly, the Plaintiff has failed to state a cognizable cause of action under Section 1983. That Defendant Johnston was acting under the color of state law, there are insufficient facts to plead a conspiracy with any state official and mere granting by the court of a motion for a directed verdict without more being shown by the Complaint of the Plaintiff fails to form the deprivation of the Seventh Amendment of the United States Constitution . Thus this Motion is proper and ought to be sustained.

c) Plea of Statute of Limitations.

The alleged acts complained of by the Plaintiff attributable to defendant Johnston accrued on January 5, 1987, during the trial court proceedings in the Circuit Court for the City of Alexandria (see Plaintiff's Exhibit to Complaint, Final Order). It is well established that the viable statute of limitations period for a cause of action arising under section 1983 is a two year period. As was decided in **Wilson v. Garcia**, 105 S.Ct. 1381 (1985) the Supreme Court held that for purposes of selecting the proper statute limitations period all characterized as actions for personal injuries. Accordingly, the federal courts must adopt a statute of limitations period applicable to personal injury actions. In the Commonwealth of Virginia, section 8.01-243, Virginia Code (1984 repl Volume) sets forth a two year statute of limitations for personal injuries. Accordingly, the plaintiff's cause of action accrued on January 5, 1987. The Plaintiff did not file her cause of action until February 8, 1989. Therefore, any viable cause of action is time barred and the complaint ought to be dismissed on this basis alone.

CONCLUSION

For the reasons stated herein, Plaintiff has failed to state a valid cause of action under either 42 U.S.C. Section 1983 or section 1985, and therefore the Complaint ought to be dismissed and it is so requested. Additionally the Plaintiff's cause of action is not timely filed pursuant to the applicable statute of limitations and should be dismissed for this reason as well.

RESPECTFULLY SUBMITTED

S/ JOHN H. JOHNSTON

JOHN H. JOHNSTON by Counsel.

SLENKER, BRANDT, JENNINGS & JOHNSTON

by S/ Kevin L Locklin

Kevin L Locklin Counsel for Defendant Johnston

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed, postage prepaid, via both regular and certified mail, this 17th day of February, 1989, to Marie M. McMahon 103 Pratt Street Berkeley Springs, West Virginia 25411 Plaintiff prose, Donald H. Kent, 520 King Street 4th Floor, Alexandria, Virginia 22314 defendant; and Donald L. Bowman, 11 West Market Street, Leesburg, Virginia 22075, Defendant.

S/ Kevin L. Locklin

Kevin L. Locklin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division)

Civil Action No 89-0173-A
MARIE M. MCMAHON
Plaintiff

v.

DONALD H. KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants

**MOTION TO DENY
MOTION TO DISMISS**

COMES NOW Plaintiff, Marie M. McMahon, pro se, and files this, her Motion to Deny Motion to Dismiss and offers in support thereof the following:

1. Plaintiff has not failed to state a cause of action upon which relief can be granted, see attached hereto.

2. The Plaintiff has stated sufficient facts which permits cause for action under 42 U. S. C. sections 1985 (2) and (3).

3. Plaintiff did state a cause of action under 42 U. S. C. 1983; he (defendant Johnston) acted willfully in the participation with Defendant Kent and the other defendant (Bowman by omission) to Deny Plaintiff Constitutional rights to which she was entitled but deprived; Judge Kent being clothed in the authority of State Law (See attached).

4. Defendant Johnston with malice and knowingly asked for a directed verdict when he has personal knowledge that the facts of said case did not support such action in favor of his client. He also knew he was participating in denial of constitutional and civil rights to this Plaintiff, furthermore it was done to injure this Plaintiff both emotionally and financially. His Client (Aschmann) and all are very well aware of Plaintiff's extreme sensitivity to the abuse of the United States Constitution (and all laws) especially when done with obvious intent and malice by those who have a duty to respect, uphold and support same, all the the injury of someone innocent.

5. This action is not barred by the statute of limitations, it is in fact, a continuing injury because of the tortuous conduct has not ceased and injury can not as long as the acts of the defendants illegality (the result of their illegal acts) stands as an order (judgment) one of which is being

pursued in West Virginia.

WHEREFORE, for the reasons stated here(and per attached in support hereof) Plaintiff prays that the Court Deny Defendant Johnston's Motion to Dismiss and that the Case go forward to trial by jury (A 33)

Respectfully submitted,

S/ Marie M. McMahon
Marie M. McMahon, Pro se
103 Pratt Street
Berkeley Springs, WV 25411
(304) 258-1117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed , postage prepaid, U. S. Mail this 23rd day of February, 1989, to Defendants Donald H. Kent, 520 King Street 4th Floor, Alexandria, Virginia 22314; Donald L. Bowman, 11 West Market Street, Leesburg, Virginia, Va 22075 and Kevin L Locklin, Counsel to John H. Johnston, P. O. Box 2908, Merrifield, Va: 22116-2908, and the the Court in case weather impossible.

S/ Marie M. McMahon
Marie M. McMahon, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No 89 0173-A
MARIE M. MCMAHON
Plaintiff

v.

DONALD H. KENT
JOHNSTON H. JOHNSTON
DONALD L BOWMAN
Defendants

**BRIEF IN
SUPPORT OF MOTION TO DENY
MOTION TO DISMISS**

Comes now Plaintiff Marie M. McMahon, pro se, and files this her brief in Support of Motion to Deny Motion to Dismiss and does state as follows: 1. For the benefit of the Court some further background, said facts already known by Defendants, for the most part. 2. What started out as being what Plaintiff first thought was two people involved (Principal's father and one Bank official) in an effort to cheat her Principal out of his inheritance (property) has snowballed into so many people that one would have to stop and count; the number is unbelievable. Those involved, besides the Bank, are the legal profession, and the acts and omissions of said people almost keep this Plaintiff in shock because it is all so unconscionable and diabolic. It was no doubt, thought originally that since Plaintiff's Principals was (is) so, to say the least, UNLEARNED (reads and possible comprehends at about 5th grade level and even lowed in legal matters, plus the fact her (Principal) did (does) not have the money to fight for his rights and justice, the illegal people could get away with whatever they chose to do. No one had counted on Plaintiff's integrity and ethics (except the Bank,) IF she learned about said acts. The Bank, attorneys, et al, were very upset when they learned Plaintiff's Principals had given her written power of attorney and made phone calls to try to get Principals to (actually tried to scare them into) "Taking it back."

It did not work and accordingly, Plaintiff retained attorneys to prosecute the illegal acts and protect the interests of her Principals and herself. All three retained said attorneys have become defectors (while being paid and expecting payment) from this Plaintiff, each in their own

way depending on the circumstances and facts at the time, with apparent and obvious resentment that Plaintiff should expect an attorney-client relationship to be maintained according to laws and Code of Professional Responsibility...how dare she expect them to "go by the books" or argue that "this is what I think and know, but you are the attorney" ...deference NOR pointing out laws did not work, however, all would make good salesmen...they fooled Plaintiff for some time.

Actions prove the conspiracy...actors come and go, but the one purpose all have had, and have in common, is to see that it costs this Plaintiff as much as possible in emotional suffering, financially and to **deny justice** as provided by applicable laws. The same was done to Plaintiff's Principals by an attorney they paid to do something the Circuit Clerk should have done...certainly could have done with ease since he was (probably still) personal friends with the attorney who was scrivener of the the will involved.

Lack of formal education by Plaintiff's Principals affords one blessing for them...they do not understand how far reaching and all that is involved regarding what started out with a grandmother leaving property to a grandson; a life estate to the son and father with very specific conditional limitations attached thereto.

This is not conclusions...something someone dreamed up, as Defendants suggests. The facts and laws pertaining thereto legally so state and any ordinary prudent person who learns the facts and reads the laws applicable thereto understands and come to the same conclusions for themselves. This has be substantiated by a housewife, clerk and mechanic; they all had no problem seeing the conspiracy (agreement) for **hanky panky** as one put it...helping each other, etc....to deny trial by jury, the none equal treatment for equal things and "We know they had to talk it over and agree by what they did, we don't ever hear of when and how people got together to hijack a plane, but when there's more than one we know they had to plan it."

REBUTTAL TO DEFENDANT'S ARGUMENT AND LAW IN BRIEF IN SUPPORT OF MOTION TO DISMISS

2. Re a) 42 U.S.C, Section 1985

Apparently Plaintiff did plead clearly enough that Defendant was able to know that both subparts (2) and (3) applied. In referring to 1985 (2) he obviously knew that objecting to relevant evidence and not wanting it admitted was an attempt to impede the due course of justice, as was making a motion for directed verdict (which could not be done legally as all lawyers and the court knew, since all are presumed to

KNOW the laws), so since all participated in the illegal acts (Plaintiff has also asked that judicial notice should be taken of the applicable laws) there had to be an agreement (Pre-determine) of the outcome of the trial, which is why it was not allowed to go to the jury, in spite of jury demand. Transcript shows Defendant Judge Kent and Defendant Bowman must also have had a pre-agreement by Bowman's omission to argue for the jury decision (his clients all wanted trial by jury and had a right thereto) NOR did he argue for the jury off record. Further, Plaintiff was not allowed to testify fully,...she was rushed, objected to and refused admittance of relevant evidence again and again..one defendant objected, another sustained...it is a form of suppression of evidence which tended to support Plaintiff's testimony (Item 16) Defendant Bowman tried more than one to "settle" the case (all to the benefit of Defendant Johnston's client)...Defendant Judge Kent said the case should be SETTLED (item 17) with use of pressure to do so by trying to scare, threaten and/or intimidate Plaintiff into paying Defendant Johnston's client after he learned Defendant Johnston's client had a \$5,000.00 deductible insurance policy which had absolutely nothing to do with the facts and the applicable laws thereto...It DOES SHOW DISCRIMINATION IN FAVOR OF ONE's FRIENDS. This is probably why he would not make his SUGGESTIONS on record. The fact he would not (see transcript) suggests that some illegal act was to be done, otherwise there was no need to go off record.

There was a motion against amending by Defendant Johnston and Defendant Kent obliged by sustaining and in spite of argument of unequal treatment Defendant still denied amendment. Amendment is permitted even after judgment if justice demands (which this did) BY many courts, in reported cases. Items 15, 18, 20, and 24, also 13 and 14 show pleadings...items 21 22 and 24 also tends to show a trial by jury was not a a part of the plan in spite of facts and laws...Defendant Bowman's omission to argue for jury and Defendant Kent's failure to ask if he had any arguments in item 22 and additionally it was apparent and obvious that the "non-suit" had been pre-arranged by all three Defendants. (which Plaintiff does not object to, but does object to the way it was done). The above reflects at least six (6) acts of furtherance of their agreements-pre-determinations-conspiracies, most of which are documented...only the off-record is Plaintiff's word against Defendants (which may be why there was the non-equal treatment to plaintiff's Principals in not allowing them in with their attorney, when they had as much right to as did Defendant Johnston's Client, Aschmann.

In order for Plaintiff to win against Aschmann, she had to prove that (a) he was retained, (b) that he was negligent and (c) that his negligence caused the loss and injury to his clients. Defendants herein did not want the evidence offered to be a matter of record apparently (and it was obvious early that the jury was not to see the evidence more by the looks (expressions) and more than the actions, although actions supports what the appearances suggested. It is clear that had the jury been allowed to read the documents, had the applicable laws for instructions...if the jury was able to understand what they read, they would have found in favor of the Plaintiff and her Principals as would the jury in Winchester, Virginia...because of the overwhelming evidence in favor thereof.

Suppression of evidence, denial of access threats and intimidation are all impeding and obstruction of the due course of justice 1985 (2) and the conspiracy to do such and injure as herein pled is a violation of 1985 (3). The private actors willfully participating with the state actor Judge Kent acting both individually and with official sanction and force (Judgment) makes all actors "under color of state law" for the purpose of section 1983. DENNIS V. SPARKS 449 U.S. 24, 101 S.Ct. 183, 66 L Ed 2d 186 and "Private persons jointly engaged with state officials in the challenged action are acting 'under color' of State law for the purposes of section 1983 action". ADKICKER V. KRESS & CO 398 U.S. 144, 90 S. Ct. 1598, 26 L Ed 2d 142 also supports the above.

When Defendant Johnston willfully, intentionally and with malice acted jointly with Defendant Kent (and others) to deny Plaintiff's constitutional rights as pled, he acted with an actor clothed with state authority...all acted with intent, jointly and severally, individually and collectively (as pled). Defendant Bowman admitted as much to Plaintiff on November 30, 1988, when Plaintiff suggested it was done mostly because Defendant Kent was mad at Plaintiff for refusing to pay Aschmann for malpractice. (However, Plaintiff, feels sure Defendant Bowman will deny this also) Injury continues.

For relief to be granted under Section 1983, there are two basic requirements. (1) The conduct complained of was committed by individuals acting under color of state law and (2) the conduct deprived person right secured to person by the United States Constitution or laws of the United States. Both elements are so pled and are of record. As to invidious discrimination in Defendant's brief. Black's does not show a description in Plaintiff's Fourth Edition...Funk & Wagnalls College Dictionary defines invidious as "exciting or creating ill will or dislike, offensive; provoking anger or resentment by being unjustly discrimi-

nating.” **Discriminate** is described as “to act toward someone or something with partiality or prejudice; To discriminate against a minority; to DISCRIMINATE IN FAVOR OF ONE’S FRIENDS” (emphasis added). Plaintiff has provoked the anger for doing right...because she would not go along with the original nor subsequent illegal acts and the opposition (Bank and various legal professionals) have been unjustly discriminating against her and in favor of their friends. We may or may not be a minority, those of us who try to be ethical; there must be several left in such class

United Land Corp. of America v. Clarke, cited by Counsel for Defense and **Griffin v. Breckenridge**, also cited by him (same page) do more for Plaintiff than Defendant. Conspiracy as described herein to deprive any person of equal protection of laws or equal privileges...some people still get jury trials, etc., are able to admit relevant evidence, amend, whatever, and some courts will not allow suppression of evidence and conspire with counsel to do as herein pled. **Barnard v. Young** also supports Plaintiff and she can not see where **Fleming v. Moore** can possible apply since the facts are not in the slightest related...the same is true with **Deas v. Potts**, since as in **Fleming**, supra, there is not one fact similar nor was the attorney employed by the state, nor participating with a state actor, and in **Phillips v. Mashburn**, cited by Defendant, there apparently was not a conspiracy between the judge and the private defendants, and Phillips, supra, also supports Plaintiff’s position when there is agreement (conspiracy) as herein and action in furtherance of the concerned action. This case also supports Plaintiff as a “lay pleader” which she is and has never even been a secretary. (She is good at evidence and fair at research) **Sooner Products Company v. McBride**, also cited by Defendants, also supports Plaintiff in that she has shown agreement (conspiracy) and concerted action herein in furtherance of agreement and leave to amend which has been pled by Plaintiff here and originally, the denial of leave to amend has not ever been justified, nor was it attempted to be and how could it be since it is allowed even after judgment when justice demands.

(Additionally, Plaintiff sincerely hopes Defense learns how to count...pursuant to local rules Plaintiff should have had ten days notice of motion...she had four (in this instance) lack of respect for rules and laws are still being shown...sorry about that. Finally Motion to Dismiss must be denied unless there are no set of facts which would entitle this Plaintiff to relief. **Conley v. Gibson** 355 U.S. 41, 78S.Ct. 99, 2 L Ed

2d 80 and considering a motion to dismiss, the factual allegations of the complaint must be accepted as true and all inferences must be made in favor of the Plaintiff. **Mitchell v. King** 537 F 2d 385, and lastly, motions to dismiss are generally viewed with disfavor and are rarely granted. 5 Wright & Miller, Federal Practice and Procedure, section 1357 at 598.

(Since Plaintiff is not an attorney nor an expert at pleadings she also pleads to be allowed to amend in order to meet any requirement suggested by any rule, law or unbiased person and of course, the court.)

This action is **not** barred by statute of limitations. Everyone knows that it takes an order, decree, judgment, etc., (signed) for any action to become legal and it is from such documents the next action takes effect. However, further research shows us that it is not the state law that governs in determining the proper statute of limitations to be applied; when the question of a section 1983 cause of action accrues is a question that must be determined by Federal and not state law. **Donaldson v. O'Conner**, 493 F 2d 507 (5th Cir 1974) In **Donaldson**, the Fifth Circuit Court of Appeals stated "When a tort involves continuing injury, the cause of action accrues and the limitation begins to run, at the time the tortious conduct ceases." Since the tortious conduct has not ceased as of this date there can be no limitation...it starts to run all over again with each continuous tortious act which has been and is, done continuously one, or more than one actor,...the injury can not stop until there is right direction in the interest of justice to Plaintiff and her Principals...every time they must make payments which were obtained through such illegal acts and tortious conduct...their injury continues and they live in constant fear of losing the home that was theirs by will, per applicable laws. Plaintiff's continuing tortious injury continues (all continuing torts, intentional continuing torts) because her efforts thus far have been futile because of so much illegality by those who's duty it is to have acted just the opposite ...**to the public...to their clients and to the legal profession.**

Donaldson, supra, was cited in **Story v. United States**, 629 F Supp 1174 (1986) as are some of the others cited by Plaintiff herein.

CONCLUSION

WHEREFORE, Pursuant to the pleadings herein and all foregoing in support of Motion to Deny Motion to Dismiss, Plaintiff prays for, and said Motion to Dismiss should be, denied, and this case should go forward to trial and thereby put a stop to the intended, continuing torts which Plaintiff is confident a jury trial will do.

Respectfully submitted.

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Street Street
Berkeley Springs, WV 25411
(304) 258-1117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing was mailed, postage prepaid, U. S./ Mail, this 23 day of February, 1989, to Defendants Donald H. Kent, 520 King Street 4th Floor, Alexandria, Virginia 22314; Donald L. Bowman, 11 West Market Street, Leesburg, Va. 22075 and Kevin L. Locklin, Counsel to John H. Johnston, P. O. Box 2908, Merrifield, Va 22116-2908 also Clerk of the Court, U. S. District Court, Alex. Va.

S/ Marie M. McMahon
Marie M. McMahon pro se.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No 89-0173-A
MARIE M. MCMAHON
Plaintiff

v.

DONALD H. KENT, et al
Defendants.

Friday , February 24, 1989
Alexandria, Virginia

Transcript of motion proceedings in the above captioned matter.

BEFORE

The Honorable ALBERT B. BRYAN, JR.,
Judge, United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

Ms. Marie McMahon pro se

FOR THE DEFENDANTS:

KEVIN LOCKLIN, ESQUIRE
OF SLENKER, BRANDT, JENNINGS AND JOHNSTON
3026 Javier Road
Fairfax , Virginia 2203

DON MCCOY, RPR
OFFICIAL COURT REPORTER
683 -3668

PROCEEDINGS

The Clerk: Civil Action 89-173-A, Marie M. McMahon versus Donald H. Kent, et al.

Mr LOCKLIN: Good morning, Your Honor.

THE COURT: Good Morning morning, This comes on on your motion to dismiss.

MR LOCKLIN: Yes Sir. Kevin Locklin on behalf of John H. Johnston, sir. It is our motion to dismiss the complaint filed by McMahon in this matter. Basically, Your Honor, the Premise is this. The plaintiff seeks release under Section 1985 and 1983. In reviewing the pleading and the attachments that have been filed by Plaintiff, there are insufficient facts to establish a cause of action under either statutory schemes. The conspiracy claim is vague and broad at best. It just uses a conclusory allegation that they conspired together to do x. I don't believe that's sufficient. Under Section 1983 they are saying—these, too, are conclusory allegations—again that they acted under color of state law and again relying on the conclusory allegation that they conspired.

The basis for her lawsuit is that in a civil action in Alexandria Circuit Court, Mr. Johnston made a motion for directed verdict on the claim against the Plaintiff in this action and also against her counter-claim. The Court after hearing arguments granted that motion. That is all that is shown by the pleadings and in fact for more precision as to her alleged conspiracy, she attaches a transcript and refers to it. That's as far as the specificity that she has.

In taking that specificity, in looking at what was done pursuant to that transcript there is no conspiracy. If you take what the plaintiff asserts as being true, then every case where the defense counsel makes a motion to strike and the court entertains it, they are going to be sued under 1983 and 1985 when they are dissatisfied with what resulted.

THE COURT: All right.

MR. LOCKLIN: and lastly, we would rely on the statute of limitations, Your Honor.

THE COURT: Ms. McMahon.

MS. MCMAHON: Thank You, sir.

THE COURT: Have you had an adequate opportunity to respond to this motion?

MS. MCMAHON: Not really, Your Honor but I rushed to do it as best I could. I offer to you and to counsel my response.

THE COURT: All Right.

MS. MCMAHON: Of course, I am refuting everything he says. Now, I realize I am not an attorney and maybe I do not plead exactly as an attorney would, but in my rebuttal, I think you will find that there are adequate showings of furtherance of conspiracy. You will find that there was action with a State action, a State actor, which of course gives me the 1983 Claim, when a private party wilfully participates with a State actor, that makes him a State actor as far as the 1983 claim is concerned. And that is covered in my briefs that I gave you.

THE COURT: I don't think there is any question that you are correct that as far as that a case can be asserted—

MS. MCMAHON : Thank you.

THE COURT:— under 1983 for conspiracy provided though that State actor may not himself be liable for immunity or otherwise. But I am not sure that the underlying facts that you adduce to support your claim of conspiracy does that. That is, the granting of the motion for directed verdict by Judge Kent, the making of the motion for directed verdict by the attorney Johnston, and the settlement of the claim by Bowman (phoenetic), I think it is, with the other two, your other two defendants.

Ms. MCMAHON: There never was a settlement Your Honor. It is still pending. They are still fighting me for it.

THE COURT: I mean as to the other, the resolution of the case not to you but the other parties in the matter, who were represented by Mr. Bowman. I think his name is Bowman.

THE COURT: I just wonder, what is it that they have done wrong.

MS. MCMAHON: They denied us our constitutional rights to trial by jury, Your Honor.

THE COURT: By granting a directed verdict and by making a motion for directed verdict. But Mr Bowman did not purport to represent you?

MS MCMAHON: No, but her—

THE COURT: He represented the co-plaintiffs or co-defendants?

MS. MCMAHON: This is true. They wanted a trial by jury also.

THE COURT: But they are not here complaining, You are.

MS. MCMAHON: This is true, Your Honor, but this only tends to show the conspiracy, because it is obvious the deal must have been cut before we went to Court, you see. Otherwise, if there had not been, why would Mr, Bowman not have been pleading for the trial to go to jury, because that is what we all wanted? So there must have been by their actions, there had to be. You see, this is reflected in the transcript. He

didn't know until after, or he shouldn't have known until after the verdict was made by Judge Kent that there was going to be a directed verdict..I mean a nonsuit for the other two parties. Now, if they did, then they had to have conspired, Your Honor. You see my point? That's reflected in the transcript.

THE COURT: I see your point, I am not sure that I agree with it. But I see your point. I am not sure that you have shown anything by your underlying — facts that you allege that underlie you claim for conspiracy, that there is anything but that they did what they were entitled and obligated to do on behalf of their clients in Court.

MS. MCMAHON: Why would an attorney deny a constitutional right?

THE COURT: Well, a motion for a directed verdict always if granted deprives somebody of a jury trial.

MS. MCMAHON: But as I read the law, you can't do that, Your Honor, when the overwhelming evidence is against the verdict that was made, and where reasonable minds could differ. That's what the Fourth Circuit said.

THE COURT: Well, that may be an error that the State Court committed, but it isn't one of constitutional dimensions.

MS. MCMAHON: When they do it deliberately?

THE COURT: What evidence have you that they did it other than as an exercise of his judicial authority?

MS. MCMAHON: Because I am presuming that they know the law. It seems to me that if he doesn't, he shouldn't be up there handing out judgment. I'm sorry. I don't mean to be, with all due respect, you understand what I am saying.

THE COURT: Well, we all make mistakes.

MS MCMAHON: This is true, but this was obvious to me it was no mistake, because you don't commit so many things in favor of one side unless you are intending to do so when the law provides for that persons rights.

THE COURT: I understand the point you are making.

MS MCMAHON: When it's done over, and over, and over, then it becomes where you believe it's done intentionally, in fact it shows it's done intentionally and willfully and without regard for people's rights, to go to the jury.

THE COURT : All right.

MS. MCMAHON: Now I would like to address his limitations statute, also. I didn't quote—I gave you in my rebuttal, which I really

didn't have time to do, I gave you a cite, but I did not quote from that cite. I would like to read that into the record if I can get my glasses here. "conduct of a garage owner in allegedly conspiring with State enforcement officers to deprive the plaintiff of truck was a continuing tort" which is what this is, "so that one-year limitation period applicable to Plaintiff's 42 USCA 1983 section did not accrue until State officials abandoned their claim to the truck."

I think that applies here, because it is a continuing tort that has been going on for sometime and—

THE COURT: But the last act that caused, that the defendants performed was in what, January of 1987?

MS. MCMAHON: Actually February, Your Honor, when he signed the order.

THE COURT: Do you remember when?

MS. MCMAHON: February 9, I filed this February 8th

THE COURT: February 9, 1987?

MS. MCMAHON : Yes sir.

THE COURT: All right, Anything else?

MS. MCMAHON: So it is a continuing intentional tort. It just keeps going. It's time for, as one famous man said, it's time for the buck to stop. So please, Your Honor, let it go forward.

THE COURT: I don't think it can, Ms. McMahon. It is true, as you assert, and indeed your motion in opposition to the motion to dismiss is fairly well prepared; and it's true as you say under 42 USC 1983, a private party can conspire with a State actor for a violation of 42 USC 1983, but here, insofar as 1985 is concerned, I don't think 1985 subsection 3 is applicable because that's only applicable in cases of race or some other class-based discrimination. Insofar as 85 (2) is concerned, it could probably stay—could probably be a claim, but what causes this claim for conspiracy to fail is that the facts which underlie the claim of conspiracy are the granting of a motion for directed verdict by Judge Kent, the making of a motion for directed verdict by attorney Johnston, the agreeing to a nonsuit by defendant Bowman of his client's claim, and he was not the plaintiff's attorney; these acts were even if in error, were not errors of constitutional dimensions.

For these reasons, the motion to dismiss will be granted. Of course, Judge Kent is immune, and his motion to dismiss will be granted on that ground. But the other two defendants, their motion to dismiss is granted on the ground that the facts which are asserted as purporting to establish a conspiracy just do not do that. For these reasons, the motion

(Whereupon, the proceedings in the above -captioned matter were concluded.)

I, EDWARD DONOVAN McCOY, Registered professional Reporter and Official Court Reporter for the United States District Court for the Eastern District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I was authorized to report, and did so report in Stenotype, the foregoing proceedings,

DONE and signed, this _____ day of _____, 19____, in the
City of Alexandria, Commonwealth of Virginia.

A-32

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil action No 88-173-A

MARIE M. MCMAHON

Plaintiff

v.

DONALD H. KENT et al

Defendants

ORDER

For the reasons stated from the bench, the court concludes that the defendant Donald H. Kent is immune from suit under 42 U.S.C. section 1983 and 1985 (s) ; that no cause of action can be asserted under U.S.C. section 1985 (3) because there is no class based discrimination alleged; and that the facts which underlie the claim of conspiracy, namely, the granting of a motion for a directed verdict by the defendant Judge Donald H. Kent, the making of a motion for a directed verdict by the defendant attorney John H. Johnston, and the agreeing to a non-suit of the claims of the co-defendants in the state court action by the defendant attorney Donald L. Bowman, who was representing those co-defendants, do not rise to the level of a conspiracy, constitutional or otherwise. Accordingly, it is hereby ORDERED that this action is dismissed.

S/ A.V.B. J.

United States District Judge,

Alexandria, Virginia

February 24, 1989.

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria, Division**

Civil Action No 89-0173 A

Filed Mar 6, 1989

MARIE M. MCMAHON

Plaintiff

V.

DONALD H KENT, et al

Defendants.

**MOTION FOR RECONSIDERATION
AND AMENDMENT OF JUDGMENT
TO REVERSE ORDER BY COURT**

Comes now Plaintiff Marie M. McMahon, pro se, pursuant to Rules of Civil Procedure 7 (b) (1), 59 (a) (2) (e) and 60 (a) (b) (3) (6) , and respectfully moves this Court for reconsideration by this Court to amend this Court's Order of February 24, 1989, because said Order is clearly erroneous, obtained by intentional misrepresentation by the adverse party and in violation of the United States Constitutional provisions, therefore, as a matter of THE SUPREME LAW OF THE UNITED STATES, said Order should be reversed. This case should go forward to trial by jury as demanded by this Plaintiff and per applicable law, on the merits. A memorandum in support hereof is attached.

Respectfully submitted,

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Street ,
Berkeley Springs, WV 25411
(304) 258-1117

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria, Division

Civil Action No. 89

MARIE M. MCMAHON Plaintiff,

V.

DONALD H. KENT, et al

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION AND AMENDMENT TO
REVERSE ORDER BY COURT**

COMES NOW PLAINTIFF, Marie M. McMahon, pro se, and RESPECTFULLY submits in support of Motion for Reconsideration and Amendment of Judgment to Reverse ORDER by Court of February 24, 1989, in the above captioned matter, the facts and laws as follows:

(Incidentally, please correct two items (1) Correct the Case number on your Order of February 24, 1989, and please teach the adverse party to count and instruct them to follow applicable Rules...I sincerely hope this Plaintiff does better...she does try.)

ARGUMENT

This Court had before him in the file in this case prior to making the ruling on February 24, 1989, copies of the United States Constitution which reflects the Seventh Amendment thereto, as well as the Supremacy Clause, also before the Court was a copy of Article I, section II of the Constitution of the Commonwealth of Virginia and Virginia Statute 8.01-336. Attached hereto as Exhibit I, is a copy of Judge Kent's Oath of Office where he swore to support both. We all know that all attorneys take a similar oath.

There has NOT been an amendment to the United States Constitution herein cited, to provide for denial of litigant's constitutional rights to trial by jury when the controversy is over \$20.00, if demand is made, not waived, for a trial by jury. ...the foregoing, is, of itself, enough to prevent a directed verdict according to THAT LAW. Further, not having a desire to insult this Court's intelligence, this litigant did not reiterate this on February 24, 1989, when before this Court. It was, however, pointed out in the proceedings (page 6 of transcript) that a directed verdict can only be granted if reasonable minds can not differ and the evidence is overwhelmingly on the side of the litigant seeking the directed verdict. The opposite was (is) true in Case 10607, All

officers of the court (lawyers and the court) had knowledge they were denying defendants (this Plaintiff and her Principals) their rights secured to them by both United States and Commonwealth of Virginia Constitutions. The same is true in all the related cases by all the lawyers and judges, as well as the Bank involved in the original illegal acts . (Look at the documents and apply the laws)...also attached as exhibit 2, is the case law cited in transcript herein, Page 6, at line 19, which is **Garrison v. United States**, CCA 62 F 2d 41 (4th Cir 1932).

Judge Parker also so instructed in Federal Practice and Procedure...The overwhelming evidence in 10607 is, **reiterated**, on the side of this Plaintiff and against Defendant Johnston's (herein) client, and **EVERYONE** certainly was well enough learned and educated in the law to **KNOW** the applicable laws applied to the documented (best evidence) facts would sustain this Plaintiff's position in that matter. Therefore, they deliberately committed constitutional torts,...to harass and maliciously prosecute this Plaintiff because she would not be influenced to allow and/or condone the initial illegal acts, nor subsequent abuse of the Constitutions.

Reasons for directed verdict ...look in the file herein...Defendant Johnston states (a) "Mrs. McMahon is going to tell the jury the same opinions she has just told the Court," **THAT WAS TRUE**, however, the statements were not **OPINIONS**, they were statements of **FACT**, **BEST EVIDENCE FACTS**; (b) "She had not proved with competent evidence that his client was negligent" and that is a **LIE**. **BEST EVIDENCE PRECLUDES TESTIMONY** (per case law) even if by an attorney , who no doubt would agree with them...like the rest, by telling lies. Proof of violation of statutes and rules, ipso facto, show not only negligence, but in the case of lawyers and judges who are presumed to have superior knowledge, intent to knowingly be illegal, Finally, on Defendant Johnston's reasons for directed verdict, a written contract does not (per case law) demand that the hours stated worked should be paid when it is clear that the hours (if spent) had to be spent for the adverse party's interest and not that of his client who had become victim of misrepresentation and fraud and collusion and let us not forget the Motion to Strike by Johnston, which, in effect, is a motion for Summary Judgment (per case law) and could not legally be forthcoming by the Court (Kent) because there certainly were genuine issues of facts...Johnston's Client (Aschmann) **Claimed** he did the work for Plaintiff (his clients); the evidence (and documented herein) showed he **did not**, which was argued...all genuine issues of fact. **SO MANY**

ILLEGAL ACTS CAN NOT BE ONLY ERROR...only a stupid person would believe such is ONLY error.

Defendants herein very well knew all this which is why they conspired to keep the admissible documents from the jury and denied this Plaintiff (and her Principals and many others in like circumstances get the same treatment in Virginia Courts so it is reported) the jury verdict, as provided by the laws cited hereinabove, as well as Rules of Civil Procedure.

The refusal to allow the federal provision after demand before them, to be considered, i.e., let it go to the jury as demanded, precludes the necessity of exhaustion of state remedies...per laws applicable thereto...this conduct was (is) the problem...not the lack of knowledge...it shows the intent and invidious discrimination which was out of spite and anger toward this Plaintiff to harass and prosecute her because she has to much integrity to allow her Principals to be mistreated and injured through no fault of their own, by those who wish to do so illegally, initially, and now it takes on Constitutional Torts, but the United States Constitution is worth fighting for...to get back and maintain the provisions it provides for all and once it is upheld and supported by those who's duty it is to so do, that, will return to Plaintiff's Principals what is their's by applicable laws, which is her duty.

Further intent of illegal acts is evidenced by the fact that Johnston, Bowman, Aschmann and Kent all had knowledge of violations of the Professional Code of Responsibility. This Plaintiff informed them that they could not possibly win for the adverse party without being illegal...personally told Johnston that if he defended and/or prosecuted "within the bounds of the law" they could not possibly win and stated she hoped he would not be illegal. She also pointed out to her own attorney (Bowman) his duty to uphold the same rules and codes.

There can be no excuse for officers of the courts misrepresenting facts or law, however, for the most part the Virginia Bar Association (not the local Bars) do not want to hear about any violations of attorneys...nor will they take corrective action, Usually...maybe if politics or something other than just plain facts and laws are involved...the illegal people should "Shape up or ship out" quoting what Plaintiff's husband told his recruits...as did many others.

On February 24, 1989, this Plaintiff heard a plea bargain by this Court in which one question asked the litigant was, did he understand that if he lied about the facts of the case he would be punishable by perjury.

THE POINT IS, no court, or officer of a court has any more right to lie in a proceeding than does any other party to the proceeding. Facts nor laws should be misrepresented and made into lies...the legality is the same for both ...for all...the MORALITY is much worse for those supposed to administer justice according to the laws and the United States Constitution. It is, according to Black's and case laws, an "abuse of power." Judge Raynor Snead lied about the Virginia. Laws in Winchester Circuit Court Case No. 85-L-142. He said the father (warren Fred Whirley) gave up his life estate. Virginia Case Law before this Court shows the father had no life estate to give up...he had not kept to the specific limited conditions of the Will, thus, ipso facto, he had no life estate to give up. The lawyers for the Bank , nor the Bank, NOR THE JUDGE, changed the written law...they violated it. Judge Snead also stated that case was a frivolous case. NOT TRUE. No case is frivolous when facts of record and not of record (at that time) show the defendants intentionally and with malice acted contrary to applicable laws and statutes. It has been going on, and on, and on, and on, either by word or deed , or both, ever since the beginning in the related cases, starting with 84-L-89 (by lawyers and judges). As pled, it is time for the buck to stop .

The issues, facts and laws, pointed out above can be verified and was done herein to show there is not equal protection, equal immunity (from prosecution) privileges, etc....it is easy for a court to punish a litigant if they do wrong (and they should accordingly be punished) but there is no one, thus far who want to, or desire to punish the officers of the courts when they need that same punishment, because a lie, is a lie, no matter who does it in the proceedings. The UNWRITTEN LAWS of the attorneys and judges to take care of their own is better observed by those involved herein than the laws/ Constitutions WRITTEN for the protection of us all. No justice can be obtained when those who's duty it is to administer justice, themselves, deny justice. One famous Justice of the United States Court has said "Justice delayed is justice denied."

ON IMMUNITY: Constitutional (intentional) acts by officers are not, and can not be immune

"Any person who, under color of any statute , ordinance, regulation, custom or usage of a State or Territory, deprives any individual of any rights, privileges or immunities secured by the Constitution and laws has committed a constitutional tort."

Thus, section 1983 imposes liability for substantive violation of

rights protected by the Constitution by those in government. PLEASE take judicial notice of the law. Mr. Justice Stevens has said:

“First, where a violation of substantive due process is alleged, ‘the constitutional violation is complete as soon as the prohibited action is taken’

...and further on error argument and/or state remedies exhaustion.

“No purpose would be served by requiring the victim of such a violation to pursue state tort remedies. Second, a contrary interpretation...would require a claimant to resort to state tort remedies in precisely those situations involving the abuse of governmental power to which section 1983 was directed. *Howse v. De Berry Correctional Institute*, 537 F Supp 1177 , 1180 (M/D. Tenn 1982).”

The acts as complained of herein transcend the bounds of ordinary tort law and establish a deprivation of Constitutional rights...to this Plaintiff and her Principals...which could been prevented by acting in accord with said Constitutions. ON CONSPIRACY. Black’s describes conspiracy as...“A consultation or agreement between two or more persons...to do any act with intent to prevent the cause of justice”...and..

“The essence of a “civil conspiracy” is a concert of combination to defraud or cause other injury to person or property which results in damages to person or property of plaintiff”...

With all the evidence before the attorneys and Court in 10607 to the contrary of the verdict given, the act of the directed verdict alone, per the above..“to do any act”: meets the requirement of an overt act in the furtherance of said conspiracy and ALL OTHER SUCH ACTS CITED HEREIN (the intentional continuing tort of denial of constitutional right and other overt acts have been cited herein in other pleadings as well as herein. CONSPIRACY IS AN AGREEMENT together (shown) with and BY THE OVERT ACTS (or act). It is the act that shows the conspiracy...it is the acts that also provides cause for action, cause of action.

It is the acts, conduct, that also show the intentional constitutional tort. The conduct...the intentional, improper, illegal conduct in the facts as stated herein can not be immunized. Such improper conduct is not a part of official duties (though clothed with state authority) **it is in violation of laws.**

“Such suits proceed on the theory that when an officer acts unconstitutionally, ‘he is stripped of his official and represen-

tative capacity character and is subjected to the consequence of his official conduct." * BARGER V. STATE OF KANSAS, 620 F Supp 1432.

Additionally, please see **Ashelman v. Pope** already cited herein (769 F 2d 1350 (1985)). Finally, please read **Ryland v. Shapiro**, 708 F 2d 967, on access to courts which Plaintiff submits applies in this instant case also. The facts are different, but the provisions (Constitutional laws are the same and applies here, since Plaintiff not only contends that the adverse party was wrong to seek dismissal (nor did Defendant meet the requirement for dismissal which they knew, therefore, they knowingly, willfully and with intent to commit yet another constitutional tort) asked this Court to deny access to the courts, which is of course, illegal. (The fact Defendants knew the consequences of their acts was confirmed when counsel later on out in the the hall, said to this Plaintiff" I hope there is no hard feelings" Plaintiff's reply was "I just had it done to me again in there" and though in shock because of it, Plaintiff is getting to the point that her tears start later and leave sooner than at the beginning of such illegal acts and abuses to the greatest document ever written...the United States Constitution. This Plaintiff also attaches hereto (exhibit 3) which she prays this Court will reaffirm. She also asks that we all think of the thousands of people who have lost their lives in support of, and protection of, our United States Constitution...it is worth fighting for...This Plaintiff PROMISES she will do just that in whatever way she can legally so do, and as provided by that wonderful document. Her conscience will not let her do less...the majority of the people in our country will support same, if need by...the pay raise was nothing...in comparison...the people are just (for the most part) which is WHY some of the denial of constitutional rights to this Plaintiff, i.e., trial by jury.

There is absolutely no disrespect intended toward this Court...it is an argument of facts and applicable laws...nor is this pleading intended as an insult of intelligence...Plaintiff presumes this Court has knowledge of what is herein pled and respects the superior knowledge, but RESPECTFULLY requests reconsideration and reversal of said ORDER cited herein.

WHEREFORE , Plaintiff prays, pleads and implores this Court, based on the facts and laws pled herein, to reverse the Order of February 24, 1989, and allow the case to go forward to trial per applicable laws and rules. Plaintiff submits Defense does not (did not) Nor could not legally , under applicable facts, laws and rules herein, ask this Court to

deny access to the court, which Motion to Dismiss was here, and though having so acted this court does not have the right to grant request and thereby deny access to court...right to petition for redress ...be given a full and fair hearing...etc., all constitutional provisions due Plaintiff.

Plaintiff begged the President (at the time) of Farmers and Merchants National Bank of Winchester to please not compound the wrongs...the illegal acts...he responded (evidence also shows perjury) by trying to "cover up" which is impossible...some, (most) is a matter of record. Plaintiff herein pleads for this Court to not compound illegal acts, with all due respect to this Court, Please reverse the Order herein.

Respectfully submitted

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Street
Berkeley Springs WV 25411
(304) 258-1117

* Such conduct also stripes away jurisdiction according to U.S. Supreme Court, and is why Kent's judgment is void.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Reconsideration and Amendment of Judgment to Reverse Order by Court and Memorandum in Support there of, was mailed, postage prepaid, U. S. Mail, this 6th day of March , 1989, to Defendants Donald H. Kent, 520 King Street 4th Floor , Alexandria, Va. 22314; Donald L. Bowman, 11 West Market Street, Leesburg, Va 22075 and Kevin L. Locklin , counsel to John H. Johnston, P. O. Box 2908, Merrifield, Va 22116-2908, and hand carried copy to the U.S. District Court. Alex. Va.

S/ Marie M. McMahon
Marie M. McMahon, pro se.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

Civil Action No. 88-173-A

MARIE M. MCMAHON

Plaintiff

v.

DONALD H. KENT, et al

Defendants.

ORDER

Upon CONSIDERATION of the motion of the plaintiff for reconsideration of the court's February 24, 1989, order it is hereby ORDERED that the motion is denied.

S/A.V.B.J.

United States District Judge

Alexandria , Virginia

March 10, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-0173-A

MARIE M. MCMAHON

Plaintiff

v.

DONALD H. KENT et al

Defendants

NOTICE OF APPEAL

To: Donald H. Kent

520 King Street 4th Floor

Alexandria, Virginia 22314

Donald L. Bowman

11 West Market Street,

Leesburg, Va. 22075

Kevin L. Locklin

P. O. Box 2908

Merrifield, Va. 22116-2809

You are hereby notified that the Plaintiff, Marie M. McMahon, pro se, in the above styled action will appeal to the United States Court of Appeals for the Fourth Circuit the decision of the Court embodied in that Order of February 24, 1989 and March 10, 1989, and entered herein. Pleadings, transcript, exhibits and other incidents of the case necessary for decision will be filed.

S/ Marie M. McMahon

Marie M. McMahon, pro se

103 Pratt Street

Berkeley Springs, WV 25411

(304) 2581117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I have served a true copy of the foregoing Notice of Appeal, by United States Mail, postage prepaid, upon the hereinabove Defendants and Counsel for Defendant Johnston (Mr. Locklin) at their respective addresses shown hereinabove, this 15th day of March, 1989, also District Court, Alexandria, Virginia.

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Street
Berkeley Springs, WV 25411
(304) 258-1117

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2657

McMahon v. Kent

Filed Mar 30, 1989
U.S. Court of Appeals
Fourth Circuit

ORDER TO PROCEED ON INFORMAL BRIEF

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need to be set forth, as requested on the form. If a supporting memorandum is essential to address the issues adequately, it may be attached to the briefing form. The court will review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' brief.

2. The six-digit docket number appearing above shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Informal briefs shall be mailed to the Court with copies to all the parties, NO LATER THAN THE following dates;

Appellant's Brief

(original and one copy) 4/19/89

Appellee's Brief - 14 days after receipt of Appellant's Brief

(original and one copy)

If the appellant fails to file a brief or statement of issues the appeal will be subject to dismissal for failure to prosecute pursuant to Local Rule 45.

4. The original and one copy of the parties' briefs shall be mailed to the Court , with first class postage pre paid and affixed, addressed as follows:

United States Court of Appeals for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, Va 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy of the document was mailed to all other parties at the same time, the court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions **MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.**

7. Transcript of trial proceedings **WILL NOT** be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that can not be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal can not be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Any Corporate Disclosure Statement or Counsel of Record Form enclosed must be completed and returned within 10 days of the date of this order.

10. Appellants may, but need not, file a docketing statement within 10 days of filing notice of appeal. The form and instructions should have already been provided to appellant by the district court.

JOHN M. GREACEN
CLERK.

copies to:
Marie M. McMahon
103 Pratt Street
Berkeley Springs WV 25411

Kevin Lee Locklin, Esq
SLENKER, BRANDT, JENNINGS 7 JOHNSTON
P. O. box 2908
Merrifield, Va 22116

To be returned by: 4/10/89 kac

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Richmond, VA

30 March 1989

No. 89-2657

McMahon v. Kent

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Local Rule 47 and Internal Operation Procedure 47.1

Marie M. McMahon, who is appellant

Name of party appellant/ appellee

Make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

(check one) () Yes (x) No

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

(check one) (x) YES () NO

If the answer is YES, list below the identity of such corporation and the nature of the financial interest:

F & M National Corp (Farmers and Merchants National Bank)
Winchester, Virginia. Said Bank was a party to original litigation from which this action arose ...for fraud, conspiracy.

S/Marie M. McMahon, pro se April 7, 1989

signature of counsel

date

103 Pratt Street

Berkeley Springs, WV 25411

Phone (304) 258-1117

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
89-2657 McMahon v. Kent

CAA 89-173-A

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability..Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

Violations of Constitutions (United States and Virginia)...Violations of 42.U.S.C. sections 1983 and 1985 (2) (3). Amendment 1, U.S. Constitution...right to petition government...access to courts.

2. Did the district court incorrectly decide the facts? If so, what facts?

On page 8, transcript, the Court admitted that a private party could conspire with a state actor for violation of 1983, (it is obvious that Defendant Kent is a State actor): and same page "85 (2) is concerned, it could probably stay" ...but goes on to say conspiracy isn't there...which isn't true per the facts and transcript of 10607...conspiracy is not an absolute element of 1983 anyway per case law...and it all, conspiracy included, is for a jury to decide the facts. The Court is also in error concerning immunity for Defendant Kent. No judge is immune when he acts unconstitutionally.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

The laws cited in item 1 above and those cited in pleadings transmitted from district court. Daniels v. Williams, 106 S.Ct. 662 re intentional abuse of gov. auth. and substantive due process (1983): Barker v. McCollan 99 S. Ct. 2689, 61 L Ed 2d 422 (1983) imposes liability for violations for rights protected by the Constitutions. On amendments in addition to the ones already cited, Mosher v. Kane 784 F 2d 1885 (9th Cir 1986) Take judicial notice of all laws supporting damages applied to these facts herein...many such cases; various Virginia Statutes also apply. On conspiracy in addition to Ashelman,

supra, herein, Norton v. Liddel, 620 F 2d 1375 (10th Cir 1980) Should state exhaustion come up, Patsy v. Fla Int. Univ., 457 U.S 509, 102 S.Ct. 2564.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

Yes, Appellant feels that district court was making this snowball bigger and carried forward the illegal acts to try to help cover up the illegal acts that started with Farmers and Merchants National Bank wherein there is documented fraud, coercion, conversion (of note to get payments) and various violations of Virginia statutes as well as some banking and federal laws. There is no doubt the district court knew exactly what he did. He had to know he, too, denied constitutional right ...access to court, example.

5. What action do you want the Court to take in this case?

The Appellant has never wanted anything(nor has her Principals) except the proper laws applied to the facts...originally in the original action...the rights and privileges and equal protection of the laws in proceedings.

The case should go to trial by jury on the facts...the courts should administer fairly and unbiased and according to their constitutional oaths of office...we only want what every litigant is supposed to be able to have pr the laws and rules, to try to obtain justice and maintain the Constitutional provisions.

6. If you think the Court should hear oral argument in this case, why do you think so?

No, despite what the adverse party may claim, though Appellant has done very few pleadings compared to lawyers, she believes this Court or any reader of the pleadings will be able to understand what is pled and what is provided by the applicable laws. Should a jury find that they believe the facts (mostly documents) ...also admissible per rules of evidence.

S/ Marie M. McMahon

Signature

NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

I hereby certify that I have served a true copy of the foregoing

Informal Brief/ Disclosure of Corp. Affiliations and Fin. Int. by United States Mail, postage prepaid, upon Defendants Donald. H. Kent, 520 King Street 4th Floor, Alexandria, Va. 22314; Donald L Bowman , 11 West Market Street, Leesburg, Va 22075 and Counsel for Defendant Johnston, Kevin Locklin, P. O. Box 2908, Merrifield, Virginia 22116-2908, this 7th day of April, 1989.

S/ Marie M. McMahon, pro se
103 Pratt Street
Berkeley Springs, WV 25411
(304) 258-1117

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
89-2657 McMahon v. Kent

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

The trial court properly analyzed the action as pled and the failure through the Plaintiff's own admissions to have any cause of action countered upon conspiracy.

2. Did the district court incorrectly decide the facts? If so, what facts?

No.

3. Did you think the district court applied the wrong law? If so, what law do you want applied?

No. Case law is well established in this area of law, pursuant to 42 U.S.C. section 1983 and 42 U.S.C Section 1985. The Court properly applied the existing case law.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

No.

5. What action do you want the Court to take in this case?

John H. Johnston seeks this Honorable Court to affirm the District Court's Dismissal

6. If you think the Court should hear oral argument in this case, why do you think so?

John H. Johnston does not believe that Appellate argument is necessary

S/Kevin L. Locklin

Signature

NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE

LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

I HEREBY CERTIFY that a true copy of the above , has been mailed, postage prepaid, this 18th day of April, 1989 to Marie M. McMahon, Plaintiff, pro se, 103 Pratt Street, Berkeley Springs, West Virginia 25411; Donald H. Kent, 520 King Street, 4th Floor, Alexandria, Va 22314; Donald L. Bowman, 11 West Market Street, Leesburg, Va. 22075.

S/ Kevin L Locklin
Kevin L. Locklin

VIRGINIA
IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA
At Law No. 10607

CHARLES G. ASCHMANN, JR.

Plaintiff

v.s.

MARIE M. MCMAHON

BART WHIRLEY AND

ALICE WHIRLEY

Defendant

FINAL ORDER

THIS MATTER came before the Court for trial on the merits on January 5, 1987 with all parties present with their counsel except for Mrs. McMahon, who appeared pro se.

Whereupon, a jury of eleven was called and VOIR DIRE by the Court and counsel and thereafter the parties exercised their preemptory strikes and the remaining five jurors were put upon their oaths to well and truly try the issues joined in this case

Thereafter, Plaintiff Aschmann presented evidence in support of his claim and rested his case. The defendant and counter-claimant, Marie McMahon, presented her case as did the defendants Alice and Bart Whirley. Plaintiff then presented rebuttal evidence.

At the close of the evidence plaintiff Aschmann made a motion for summary judgment and directed verdict against defendant McMahon and further made a motion to strike the evidence on Ms. McMahon's counterclaim. Argument was had on these Motions. The Court being of the opinion that the Plaintiff's motion for directed verdict against defendant McMahon and Plaintiff's motion to strike McMahon's counterclaim should be granted, these motions were granted. Thereafter, Plaintiff moved for voluntary nonsuit against defendants Alice and Bart Whirley, which Motion was granted.

IT APPEARING TO THE COURT that judgment should be entered in accordance with the Court's ruling it is

ADJUDGED AND ORDERED that the judgment is entered on behalf of plaintiff Charles G. Aschmann, Jr., against the defendant Marie McMahon in the amount of Seven Thousand Dollars (\$7,000.00) with interest from January 5, 1987; it is

FURTHER ADJUDGED AND ORDERED that the defendant McMashon's counterclaim be, and the same hereby is, dismissed with prejudice and the defendant McMahon shall recover nothing on her counterclaim; it is

FURTHER ADJUDGED AND ORDERED that this case is dismissed without prejudice as against the defendants Alice and Bart Whirley.

AND THIS ORDER IS FINAL.
ENTERED 2-9-87

S/ Donald H. Kent
DONALD H. KENT
Judge

SEEN:
s/ John H. Johnston
John H. Johnston
counsel for Charles G. Aschmann, Jr.

S/ Donald L. Bowman
Donald L. Bowman
Counsel for Alice and Bart Whirley

SEEN AND EXCEPTED TO:

S/ Marie M. McMahon
Marie M. McMahon, pro se

A COPY TESTE
Edward Semonian, Clerk

LAST WILL AND TESTAMENT

I, ANN S. SCHRADER, a resident of Winchester, Virginia, being of sound mind, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, hereby revoking all Wills and Codicils heretofore by me made.

FIRST: I direct that all my just debts and funeral expenses be paid as soon after my death as practicable.

SECOND: I bequeath to my son, WARREN FRED WHIRLEY, and his wife, ELSIE MAY WHIRLEY, jointly, my automobile and all my personal property of every kind, wherever located, provided they are married and living together at the time of my death. If the said WARREN FRED WHIRLEY and ELSIE MAY WHIRLEY re not married and living together at my death, then I bequeath my ;automobile and all my personal property to WARREN FRED WHIRLEY.

THIRD: I devise my real estate on Roosevelt Boulevard in Winchester, Virginia, to WARREN FRED WHIRLEY and ELSIE MAY WHIRLEY for the natural life of WARREN FRED WHIRLEY and so long as they are married and living together, maintain the property in as good condition as when they took possession, keep the property insured for its full value, and pay all real estate taxes when due; and upon the death of WARREN FRED WHIRLEY to my grandson, BART A. WHIRLEY, and his heirs, in fee simple. Should said BART A. WHIRLEY predecease his father, then I devise and bequeath said real estate, subject to the life estate, terms and conditions hereinabove set forth, to WILLIAM M. MOTE, Trustee, IN TRUST, for the children of BART A. WHIRLEY, said real estate to be sold and the proceeds therefrom to be held in trust until the youngest of BART A. WHIRLEY'S children have reached eighteen years of age, at which time said trust will terminate and said proceeds shall be distributed to said children in equal shares. Upon breach of any of the aforesaid conditions the said life estate will terminate immediately and the remainderman, or his successors, shall be entitled to immediate peaceable possession without action. The determination of whether or not the aforesaid conditions are breached is hereby left to the sole judgment of my Executor hereinafter named. I state that I do this in memory of the request of me late husband, AUTHOR SCHRADER.

FOURTH: Should BART A. WHIRLEY predecease his father and

die without children, I bequeath the said real estate to my granddaughter CINDY D. PURDY, in fee simple, subject to the life estate, conditions and terms hereinabove set forth.

FIFTH: Should the said WILLIAM M. MOTE, Trustee, be unable to qualify and serve as such for any reason, I then nominate and appoint the FARMERS AND MERCHANTS BANK OF WINCHESTER, VIRGINIA, as Trustee of the Trust Fund hereinabove set forth. Neither of said Trustees shall be required to post surety on their bonds in qualifying and serving as Trustee of the Trust Fund hereinabove set forth.

SIXTH: I hereby nominate and appoint WILLIAM M. MOTE of Winchester, Virginia, as Executor of my LAST WILL AND TESTAMENT to qualify and serve as such without surety of his bond. If for any reason he should be unable to qualify and serve as Executor of this my LAST WILL AND TESTAMENT, I hereby nominate and appoint the FARMERS AND MERCHANTS BANK OF WINCHESTER, VIRGINIA, as Executor, likewise to qualify and serve as such without surety on its bond. WITNESS my hand and seal the 20th day of July, 1981.

S/ Ann S. Schrader

Ann S. Schrader

The above signature of ANN S. SCHRADER, was made and the foregoing Will was acknowledged to be her LAST WILL AND TESTAMENT, in the presence of us, three competent witnesses, present at the same time, and we, the said witnesses, do hereunto subscribe the said Will on the date last above written, in the presence of ANN S. SCHRADER and of each other, at the request of the said ANN S. SCHRADER, who was then of sound mind and over the age of eighteen years.

S/ Elaine L. Keckley Address: Winchester, Virginia

S/ Barry Walker Address: Winchester, Virginia

S/ Wm. M. Mote Address: Winchester, Virginia

Book 63 page 753

STATE OF VIRGINIA, CITY OF WINCHESTER, TO WIT:
IN THE CLERK'S OFFICE, CIRCUIT COURT FOR SAID CITY
ON November 1, 1983, the following order was ENTERED:

A writing, bearing date of July 20, 1981, purporting to be the last will and testament of Ann S. Schrader deceased, was produced before the clerk, and it being proved by the oaths of Elaine L. Keckley and William M. Mote the subscribing witnesses thereto, that Ann S. Schrader has signed said paper as and for her last will in their presence, they being present at the same time, and that at her request, they had signed the same as attesting witnesses thereto in her presence and in the presence of each other, and that said Ann S. Schrader was at the date of said will of sound mind and disposing memory, it is ordered that said paper be admitted to probate as and for the true last will and testament of Ann S. Schrader, and it is ordered to be recorded.

S/ Michael M Foreman
Clerk

AFFIDAVIT

STATE OF VIRGINIA)
COUNTY OF LOUDOUN) ss

We, BART A. AND ALICE J. M. WHIRLEY, being first duly sworn, depose and say:

1. That on the morning of December 11th, 1983, we went to our lawyer's office (Ms. Brumback) on Kent Street, Winchester, Virginia to talk with her before all of us going to the Office where Fred and Mr. Bryan was waiting for us.

2. That we asked Ms. Brumback if we could pay up the First Deed or get a loan someplace else and pay it off and then sue Farmers and Merchants Bank to get Fred's loan off. She told us it would do us no good to pay up the first and they'd still foreclose on the second (Fred's) before we could do all that.

3. That if we didn't take over Fred's loan they'd foreclose on the First, that there was no way out of paying both.

4. (That Marie McMahon had talked with us before we went to Brumback's Office and told us she had talked to another lawyer and thought we should see him, but Bart said "We have a lawyer, a lawyer is a lawyer, this one is supposed to help us." We already had the appointment with her and it was getting late.)

5. That Alice told Ms. Brumback that we'd like her to get in touch with Marie McMahon (and gave her Marie's phone number) because Marie was Grandma's best friend and knew all about the Will and everything and would be glad to help any way she could.

6. That Brumback said we had to go at that point, ignoring what Alice had said and said we had to go that they (meaning Bryan and Fred) were waiting for us at the bank. (We were late getting there).

7. That when we got to the meeting at the (we think) Yost Building, Bryan said we know why we're all here something has to be done today so we can get our money and Mr. Whirley has said he will give up his life estate; Fred wanted to know how long he had to get out. That's all he wanted to know so he said. Both lawyers said he'd give up his life estate. He stayed the entire meeting for some reason.

8. That during the meeting Bryan almost shouted at us that something had to be done, meaning we had to sign those papers.

9. That the main thing they talked about was foreclosure. If we tried to talk about the 1st (Pay it up) they said they'd foreclose on the 2nd. Bryan said they were ready to foreclose and if we hadn't signed those

papers they would have. (I still do not understand why they didn't tell us Fred was behind two payments when Alice asked them when we were there in October; we wanted to know if he was one day late.)

10. That once they convinced us we had to sign, we had to be back at 1:00 p.m. They said there was no way out of it.

11. That back at Brumback's Office, Bart said "It's a shame we have to pay my Dad's note" and she again said no way out of it. She told us finally, to have lunch and meet them back at the Bank. We couldn't eat, we didn't feel like it of have time, only had 30/45 minutes at the most.

12. That we talked about moving back but were afraid they would foreclose somehow. Ever since, we feel that if they want to they will, if we pay or not. When we pay they still sent us stuff wanting more signatures. They treated us like we were the bad guys. We will continue to worry as long as we have a loan at Farmers and Merchants Bank. We can't trust them or their lawyers

S/ Bart A. Whirley-
Bart A. Whirley
S/ Alice J. M. Whirley
Alice J. M. Whirley

STATE OF VIRGINIA
COUNTY OF LOUDOUN, TO WIT:

Subscribed and sworn to before me this 14th day of March, 1985.

S/ Billy R. Coupee
Notary

My commisson expires 11-18- 1985.

VIRGINIA
IN THE CIRCUIT COURT OF ALEXANDRIA

CHARLES G. ASCHMANN, JR
Plaintiff.

v

MARIE M. MCMAHON
Defendant

At Law No. 10607 JURY TRIAL DEMANDED

MOTION FOR JUDGMENT Counterclaim

Comes now Marie M. McMahon, pro se, and files this, her Counterclaim and states as follows:

1. Only Defendant McMahon entered into contract with Plaintiff to pay him to prosecute a At Law Case 89-L-89, Winchester Circuit Court, Virginia) for the Whirleys. It was understood by all parties that the Whirleys could not and would not be able to pay Plaintiff until he won the above referenced case, at which time he was to receive a contingency fee.. Bart A,Whirley and Alice J. M. Whirley only signed giving their permission for the Plaintiff to represent them in said case. All parties knew this.

2. Since One (1) above is true the Whirleys should not have been included in General District Court File No. 86-2017, Alexandria, Virginia, as Plaintiff well knows, nor the instant suit.

3. Said Marie M. McMahon has paid to Plaintiff \$1,878.34 plus \$666.00 Censure bill caused by him in Case No. 84-L-89.

4. Plaintiff breached his contract with Marie M. McMahon and failed to perform timely, in good faith and carry out his duties as legal counsel for the Whirleys per statutes and rules of the Code of Virginia, for which he was retained.

Cause of Action

5. Defendant McMahon hereby incorporated paragraphs 1 through 4 above as fully set forth herein.

6. The conduct of the Plaintiff, as complained of herein, renders him liable to Defendant for damages sustained as a result of said conduct pursuant to Code of Virginia 54-46.

7 The conduct of the Plaintiff, as complained of herein has caused and will continue to cause Defendant to suffer mental anguish, pain and suffering for an undetermined amount of time.

Prayer for Relief

Wherefore, Defendant seeks the following relief:

- a. An award of the actual damages to Defendant in the amount of \$2,544.34.
- b. An award of compensatory damages in the amount of Fifty Thousand Dollars (\$50,000.00).
- c. An award of punitive damages in the amount of Five hundred Thousana Dollars (\$500.00.00).
- d. Defendants Costs.
- e. Such other relief as this Court deems just and proper.

Respectfully submitted,

S/ Marie M. McMahon
Marie M. McMahon, pro se
103 Pratt Stree,
Berkeley Springs, Wv 25411
Phone (304) 258-1117

TRANSCRIPT page 156 (Alexandria Circuit Court Case No 10607)

MR BOWMAN: May I make one little inquirey, if I could? I may have to reproduce this. I would like to move those two cannons be made just exhibits, if the court please.

THE COURT: Which two are those?

MR. BOWMAN: The one that lawyers' fees shall be reasonable and adequate, and, the, the contingency explanation, both of those, and, I will make copies of them in the library at this time.

THE COURT: Do you have any objection?

MR. JOHNSTON: Yes sie, I do.

MR BOWMAN: Take out everything else except that.

THE COURT: Isn't that something the court should instruct the jury on?

MR BOWMAN: As long as it goes into the instructions. I don't have any objection to it.

MR. JOHNSTON: Yes, sir, I don't necessarily think a D R should be given an instruction. I think this whole case is immaterial, judge, to tell y ou the truth, and, I have some motions.

THE COURT: This whole case ought to be settled. I have no questions about that. I have got some suggestions along that line,

PAGE 157, SAME TRANSCRIPT

MRS MCMAHON: May we hear them?

MR BOWMAN: I would agree to that.

THE COURT: ON RECORD, NO, MA'AM (emphasis added)

MR JOHNSTON: I don't mind hearing them off the record.

THE COURT: Why don't we take a brief recess.

(a brief recess was taken)

THE COURT: Back on record.

MR. JOHNSTON: Your honor, please, Mr. .Bowman went to the restroom, but , my motion doesn't have to do with this.

THE COURT: I think we ought to wait for him.

MRS. MCMAHON: May I be excused for a minute, your honor>

THE COURT: Yes, Ma'am.

(Mr Bowman returned to the courtroom)

THE COURT: All right, Mr. Johnston, Motion?

MR. JOHNSTON: Yes, Sir, Your Honor, I would move for a directed verdict against Mrs. McMahon, on the primary claim of Mr. Aschmann, and, I would, also, move to strike the evidence regarding

Mrs. McMahon's counterclaim. Your honor, Please, the evidence is clear from the Plaintiff's side, there is a contract for services signed by Mrs. McMahon. Mr. Aschmann...

PAGE 165 (same transcript, case 10607)

Mrs. McMahon feels, but, it seems to me that people who come into this court who have had a baby die or who have had a relative who has been seeing a doctor and who develops cancer, and, the doctors - - they say the doctor hasn't diagnosed it properly, they have just the same opinion, and the same feelings. But, it isn't their opinions or their feelings that govern, as far as the law is concerned.

Mrs. McMahon said he should have made amendments. We don't know that. That is what she feels. A plaintiff can come in and say the doctor would have done this test or that test, or the architect drew too many plans. He went through too many sets of plans. These are opinions of people that care and have those opinions, but, they are not opinions that can go to this jury, AND, I KNOW IF THIS CASE GOES TO THIS JURY, THIS LADY IS GOING TO ARGUE THE SAME OPINIONS TO THE JURY THAT SHE HAS JUST ARGUED TO YOUR HONOR. (Emphasis added).

She says two trips to winchester wasn't called for, i don't know. Maybe they were, but, we don't know from a competent source whether or not this man's services were done improperly. we have to assume they were done properly. He has testified that he has done them. There is no evidence to the contrary, and, I know how Mrs. McMahon feels, but, it is the

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 89-2657

MARIE M. MCMAHON,
Plaintiff-Appellant

v

DONALD KENT
JOHN H. JOHNSTON
DONALD L. BOWMAN
Defendants - Appellees

PETITION FOR REHEARING
PETITION FOR REHEARING IN BANC

Comes now, Marie M. McMahon, pro se, Plaintiff-Appellant, pursuant to FRAP 40 and FRAP 35, Petition for Rehearing and Petition for Rehearing in BANC, and respectfully moves this Court for reconsideration of the erroneous decision (Judgment) by the three judge panel on February 27, 1990

INTRODUCTION STATEMENT

Petitioner-Appellant directs the Court's attention to (1) material facts and (2) laws applicable thereto, apparently overlooked, by the three-judge panel decision of February 27, 1990. Additionally, said three-judge panel apparently failed to consider a former opinion of this court also applicable herein, which was not addressed in the February 27, 1990, Judgment.

MATERIAL FACTS APPARENTLY NOT RECOGNIZED

1. Facts material are (a) Any judge who denies any litigant their state and United States Constitutional Rights, has not only lost his immunity, he has also lost jurisdiction of the matter before him and power to proceed in said case. So states the Supreme Court of the United States, and other Appellant Courts in case law. Attorneys and Judges have a duty-owed responsibility to support the Constitutions of the States and the Constitution of the United States...in this case, Virginia. Additionally, such said judge has also violated his own oath of office when he fails to so act as is required of him by his own sworn oath and that also causes loss of immunity because by law he has by his own violative act as said oath and denial of constitutional right to litigant, lost jurisdiction, thus can not be any longer acting in his official judicial capacity and said act (or acts) can not be considered judicial acts without jurisdiction to act. Since this is true and we know it is because

no judge can act in his judicial capacity until he has taken the oath of office ...if he did, such said act would not be legal and /or binding, per the applicable laws thereto, hence it is mandatory to jurisdiction.

2. The three-judge panel may not believe the Petitioner-Appellant, but the facts are there, was per applicable laws, conspiracy to deny Petitioner-Appellant's Constitutional Rights and some of the acts done in furtherance of said conspiracy which show it are: (a) Attorney Bowman (Defendant) failed to argue FOR the jury to decide the facts in the Circuit Court Case for his clients who had also demanded a jury trial, therefore he knew that (b) Circuit Judge Kent had already sent the jury home (dismissed them) (while on break) (said break evidenced in transcript, although transcript is not of itself complete, that much is therein) and Defendant Bowman forgot apparently, to cover-up that fact which Defendant Johnston did in his closing arguments...ONLY FOR SHOW, in order to try to deceive this Petitioner-Appellant. They were not worried about Petitioner-Appellant's Principals (Defendant Bowman's Clients) because they all knew they were uneducated and unsophisticated and would not probably catch on to their schemes. However, this Petitioner-Appellant was sure she had noticed something while on said "break" and when she later checked to make sure, found she was right...said jury members had in fact, been sent home while on said break which shows there was never an intention by the conspirators to allow the jury to decide the facts/damages, and (c) Defendant Johnston's client (attorney Charles G. Aschmann, Jr) would have collected more money had he properly prosecuted the case for which Petitioner-Appellant retained him as a matter of law (Meaning as a matter of law he could have won the case...he so stated himself, and as a matter of law by the terms of his contract with Petitioner-Appellant) than he was granted by Judge Kent (after he lost jurisdiction of the case). The facts show the combined desired end result by the conspirators...invidious discrimination, obstruction of justice, malicious prosecution, malicious abuse of process and a few other laws violations as well as denial of constitutional rights...all causing injury.

3. The Circuit Court of Alexandria (Judge Kent) acted contrary to substantial and overwhelming, documented, admissible and relevant evidence when he acted without jurisdiction granting Judgment, which if said judgment was valid (which it isn't, per applicable laws) is grounds for remand.

MEMORANDUM OF LAWS APPLICABLE

1. 7 Am Jur 2d, sec 4 (attorney-client duties)
2. 7A C.J. S (attorney-client) sec. 272.
3. U.S. Constitution, Art 6, re Supremacy Clause and Oaths; Amends. 1, 7, and 14th, re access, petition, redress, jury & due process
4. Virginia Constitution, Art I., sec 11, re due process/jury
5. Code of Virginia 8.01-336: mandatory trial by jury
6. **BOYD V BULALA**, 672 F. Supp 915 (WD Va 1987); re jury trial
7. **JOHNSTON V ZERBST**, 304 U.S. 458 (1938). re juris/void judgment.
8. **BASS V HOAGLAND** 172 F 2d 205 (1949), re juris/void judgment
9. **RYLAND V. SHAPIRO**, 708 F 2d 967 (1983), sub rts/access.
10. **DANIELS V. WILLIAMS**, 88L Ed 2d 672 (1986) sub rts., (1983).
11. **BARGER V. STATE OF KAN.**, 620 F Supp 1432 (1985) juris/immunity
12. **BEARD V. UDALL**, 648 F 2d (1981) immunity/consp.
13. **ASHELMAN V. POPE** 769 F 2d 1360 (1985) immunity/consp.
14. **LYNK V. LA PORTA SUPERIOR COURT NO 2**, State refusal to allow sub. rights..., violation of Supremacy Clause (1986).
15. **HAAG V. CUYAHOGA COUNTY**, 619 F Supp 262 ((1985) fed remedy regardless of state remedy.
16. **GARRISON V. UNITED STATES**, 62 F 2d 41 (1932) may not direct verdict...4th Cir.

DISCUSSION OF LAW AND AUTHORITIES

"The trust and confidence necessarily reposed in an attorney by clients require in the attorney a high standard and appreciation of his duty to his clients, his profession, the courts and the public. HE HAS A DUTY TO SUPPORT THE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND THE STATE."

7 Am Jur 2d sec. 4 (emphasis added).

Defendants-Appellees all failed to do what the Constitutions and laws required. They conspired to deny trial by jury because they knew any ordinary prudent person on the jury who could read and comprehend the admissible, relevant, documented evidence would by applicable laws, find for Patitioner-Appellant.

" ...The case should not be withdrawn from the jury or ruled on as a matter of law where the evidence raises an issue of fact. Issues of fact for the jury include liability for breach of contract or malpractice, and the existence of an attorney-client relationship with respect to an act of omission on which a malpractice claim is based. Other questions of fact for the jury include the exercise of a reasonable degree of care and skill in representing and advising the client, performance or neglect of a reasonable duty, the question of the attorney's negligence in connection with the prosecution or defense of previous litigation for which he was employed, and whether specific conduct constitutes malpractice.

Issues of fact for the jury also arises with respect to negligence as the proximate cause of loss of the client; what the outcome of a case would have been if it had been properly tried by the attorney, such as if the attorney had conducted a proper investigation, presentation, or exclusion of evidence, or other steps bearing on a decision based on facts, fraud or other misconduct on the part of the attorney, the actual loss sustained by the client and damages." 7A C.J.S. sec 272.

The above certainly applies and precludes a directed verdict, as did their respective Oaths of Office to uphold and support the United States and Virginia Constitutions...both of which provide and DEAMND that trial by jury be afforded litigants (Seventh Amendment and Art 1-11) and so does Code of Virginia 8.01-336 which states "The right to a trial by jury as declared in Art 1 section 11 of the Constitution of this Commonwealth and by statute shall be preserved inviolate of the parties." It is mandatory and jurisdictional.

Further, the Commonwealth of Virginia must comply with specific protections as outlines by the Fourteenth Amendment of the United States, per their on Constitution cited above. The Due Process Clause takes in specific protections defined as the Bill of Rights. First, the states (as well as the federal government) must comply with the provisions (commands) of the Amendments of the United States. It is so stated in DANUELS V. WILLIMAS, 88L Ed. 2d, pg 672, Petitioner submits that since the Sixth and Eighth Amendments fall within this protection, so should , and does, the Seventh Amendment. Secondly, the Fourteenth Amendment Due Process Clause has the substantive due process which bars arbitrary government action such as the courts action, BOTH in Circuit (judge Kent) and District Court (Judge Bryan).

Commonwealth and United States Constitutions provided for trial by jury, but individuals arbitrary actions did not. Since such was the case there is cause of action under 1983, regardless of the availability of state remedy, i.e., denial of constitutional rights and substantive due process and subjected thereto under color of law, equals cause of action. "The constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of section 1983." DANIELS, *supra*.

The states are at fault for liscensing such people, not correcting such, but allowing such illegal acts to be imposed on litigants. The laws state: "That no person shall be deprived of life, liberty or property without due process of law"..."That in controversies representing property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."..."Jury trial shall be preserved inviolate of the parties." This did not happen in either Circuit nor District Court...the Constitutions and statutes were not complied with, therefore, under DANIELS, *supra*, and JOHNSON V. ZERBST 304 U.S. 458, there is loss of jurisdiction/cause of action and void judgemnt. JOHNSON, *supra*, states:

"A court's jurisdiction at the beginning of a trial may be lost "in the course of the proceedings" due to failure to complete the court, as the Sixth Amendment requires, by providing counsel for the accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement os the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of the conviction pronounced by a court without jurisdiction is void..." This is criminal, but the same conclusion was reached in BASS V. HOAGLAND , 172 F 2d 205 , in stating:

" We believe that a judgment, whether in a civil or ciminal case, reached without due process or law is without jurisdiction and void, and attackable collaterally by habeas courpus if for crime, or by resistance to its enforcement if a civil judgment for money...The right of jury trial, if not waived bud denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power".

Now let us determine what a proper judge and one who apparently upholds his Oath of Office, who is also a Virginia Judge, has to say re jury trials in Virginia, etc.: in BOYD V. BULALA Judge

Michael (W.D.Va. 1987) stated:

"The founders of our nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

Quoting Chief Justice Rehnquist in *Parkland Hosiery v. Shore*, 439 U.S. 332, 343, 99S.Ct. 645, 657-58, 58 L Ed 2d 552(1979) dissenting. Further:

"In colonial America, the Crown's use of bench trials to circumvent the right to a jury was one of the chief grievances of those who advocated independence. Wolfram, *The constitutional History of the Seventh Amendment*, 57 Minn L. Rev 639, 654 n.47 (1973). Among the oppressive acts cited in the Declaration of Independence are laws "depriving us, in many Cases, of the Benefits of Trial by Jury." The thirteen new American states all guaranteed the right to trial by jury in civil cases. In fact, "(t)he right to trial by jury was probably the only one universally secured by the first American state constitutions..." L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960), quoted in *Parkland Hosiery* 439 U.S. at 341, 99S.Ct. at 656 (Rehnquist, J. dissenting).

"The omission of the right to a civil jury trial was one of the principal objections raised to the proposed Constitution in the ratification debates in the various states. Wilfram, *supra*, at 667-725. Among the arguments advanced for civil jury trials were "the protection of debator-defendants; INTERESTS OF PRIVATE CITIZENS IN LITIGATION WITH THE GOVERNMENT AND THE PROTECTION OF LITIGANTS AGAINST OVER-BEARING AND OPPRESSIVE JUDGES." Wolfram, *supra*, at 67-71. Ultimately, these arguments prevailed when Congress passed the seventh amendment in 1789 and VIRGINIA completed the ratification of the first ten amendments in 1891. (emphasis added).

Virginia statutes have been demanding jury trials since 1791 and still does, in fact, "is equivalent to or stronger than the right secured by the seventh amendment of the United States Const.," it is so stated in *BOYD*, *supra*, and further from same cite:

"This court earlier undertook to analyze the right to civil jury trials provided by the Virginia Coustitution, *Boys v. Bulala* ,

647 F supp. at 788-90. The Court concluded that the right to trial by jury guaranteed in Article I, section 11 of the Virginia Constitution is equivalent to, or arguably stronger than, the right secured by the seventh amendment. Id.

Petitioner strongly suggested to her attorneyus that the original case should be filed in federal court (W.D.Va) instead of state court; she is very sorry that she bowed to their decisions to not so file there...she can now see why she did not prevail...this Judge would have granted trial by jury....no doubt. Judge Michael further wrote...

"Additur is prohibited under the seventh amendment because it would require a plaintiff " to forego his constitutional right to the verdict of a jury" and accept instead an assessment"partly made...by a tribunal which has no power to assess." quoting Dimick v. Schiedt, 293 U.S. at 487, 55S.Ct. at 301."

Therefore, he agrees that a judge does not have the right to usurp the functions of a jury as done by Curcuit Court Judge Kent.

Further, RYLAND V. SHAPIRO, shows that "State agents may simultaneously violate both substantive and procedural rights" 42 U.S.C.A. Section 1983: U.S. C.A. Const. Amend 7, 14, and, from same cite:

"Mere formal right to access to the courts does not pass constitutional muster, but rather, access must be adequate, effective and meaningful, and interference with right to access to the courts gives rise to claim for relief under 1871 civil rights statues 42 U.S.C.A. section 1983."...

and as in RYLAND, supra, the acts complained of herein "could be analyzed alternatively as conspiracy to obstruct justice" and no doubt invidious discrimination against Petitioner can be established, partly because she loves justice and her integrity is not for sale or to be compromised when it comes to her civic/fiduciary duties and/or integrity of the legal profession wherein she has interests and duty-owed responsibilities.

Circuit Court Judge Kent also violated his United States Constitutional Oath as well as Virginia's and in LYNK V LA PORTA SUPERIOR COURT NO 2, it is states:

"States's unreasonable refusal to allow federal question to be presented in its courts would be violation of the Supremacy Clause. which Supreme Court cpuld rectify on direct review of state court's judgment. U.S.C.A. Const. Art 6, Cl 2."

Under the Supremacy Clause/Oath of Office (Art 6) ALL judges

are bound by said Constitution. We certainly can understand why. It is the loss of jurisdiction ...loss of power to proceed by any court who violates the provisions of the Constitutions. First, he does not have the power to perform or take jurisdiction of a matter until AFTER he has taken the oath of office,...if he did so, any act would be void because he had not been sworn into office per the applicable laws thereto. The same is true when a judge either fails (act of Omission) to rule per the constitutions; or denies (act of commission) substantive rights; or having lost jurisdiction because of violations, assumes powers he no longer has, or never did have because not granted to him per applicable laws. None of us have the right to violate another's constitutional rights...our own oaths of office forbid it...and this violative acts also makes one guilty of at least, (by one's own conduct) false swearing in a material matter (for a judge the matter before him...or an attorney who also has taken the same oath of office...or any of us who would so act in a judicial matter) and in Virginia , per the statute, one is guilty of perjury, in Petitioner's personal opinion. Constitutional duty-owed responsibility to the people do not allow for such conduct without redress provision, which is supplied by the Constitutions (First Amend plus Fourteenth and others, and is mandatory...It is not discretionary).NOR, is anyone immune for such conduct...in fact, section 1983 is specifically for such conduct, remedy, and conspiracy is not a necessary element to invoking 1983. HAAG V. CUYAHOGA COUNTY, plus other cases.

Further on immunity, in BARGER V. STATE OF KAN., it is stated:

"we have, however, consistently held that suits against state officers in the individual capacities are not barred by the Eleventh Amendment, citing Beck v. Kansas University Psychiatry Foundation, 580 F Supp 1216, 12220 (D. Kan1983). We have allowed such to proceed on the theory that when an officer acts unconstitutionally, he is"stripped of his official or representative character and is subjected to the consequences of his official conduct." Ex parte Young, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-54 52 L Ed 714 (1908^o See also Pannhurst State School & Hospital v. Halderman, 465 U.S. 89 , 102, 140 S.Ct. 900, 909, 79 L Ed 2d 67 (1984); plus two other cases."

Additionally, from BARGER, supra, dismissal is also covered re District Court and Judge Bryan, in stating:

"The court may not dismiss plaintiff's complaint for failure to

state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S/ 41, 45-46 (19587) and "In considering a motion to dismiss the factual allegations of the complaint must be accepted as true and all reasonable inferences must be made in favor of the Plaintiff. Mitchell v. King, 537 F 2d 385, 386 (10th Cir 1976). and "Motions to dismiss are generally viewed with disfavor and are rarely granted. 5 Wright & Miller, Federal Practice and Procedure Section 1357 at 598."

It certainly appears that the courts do not wish to believe this Petitioner, thus far, even though she documents ...but the individual actors are liable for their own illegal conduct. Also , in BEARD V. UDALL:

"This court, relying on the Supreme Court's decision in Stump v. Sparkman , 435 U.S. 439, 98 S.Ct. 1099, 55 L Ed 2d 331 (1978) held that a judge does not enjoy judicial immunity if the judge's actions were either non-judicial or taken in clear absence of all jurisdiction. Rankin, 633 F 2d at 850. See also Lopez v. Vanderwater, 620F 2d 1229, 1233...(1980) We then held that if Rankin's allegations were true, the judge would not enjoy judicial immunity...becauseof (1) the judge acted in the clear absence of jurisdiction; and (2) by agreeing in advance to grant the petition , he acted non-judicially."

The same thing is true here...since Petitioner can prove her allegations as fact,(the judge acted in the clear absence of jurisdiction (1) and (2) there had to be an agreement in advance to have sent the jury home, dismissing same...which is termed herein BRAND, supra, as acting non-judicially. Rankin, supra, "We therefore reversed the district court's summary judgment and remanded for further consideration." BEARD, at page 1286. As in Rankin, an agreement as to the outcome is not a part of a judicial act and is exactly on point in the instant case.

There acts took place outside the courtroom...the conspiracy to deny the jury trial, evidenced by dismissal of said jury before going back into the courtroom from the break...Bowman's failure to argue for the jury to decide the facts, while one Defendant tried to cover-up by argument, after return to the courtroom. "We then concluded that a "prior agreement to decide in favor of one party is not a judicial act" BEARD, supra, page 1286.

Also, ASHELMAN V. POPE, supports that an agreement made

prior"defendants beforehand to deprive him of his rights" is not a judicial act, by judge/prosecutor, and states:

"Both the judge and the prosecutor would be acting outside the scope of their official duties in entering into such an agreement. It is immaterial whether the conspirators' subsequent acts pursuant to the agreement are within their respective scopes of authority, ...it is the prior agreement that is deemed the essential cause, thus, neither the judge nor the prosecutor would be shielded by immunity."

Petitioner submits that neither are defense attorneys immune who predetermine the outcome with the court...these are just as liable as was the prosecutor and the court/judge in *Aselman*, supra. Again, however, though these are the facts, the conspiracy is not an element necessary for 1983 cause of action....only the denial of constitutional rights under color of laws and district judges herein.

Finally, the Circuit Court Judge Kent (although without jurisdiction when he did so) acted contrary to the overwhelming evidence and in *GARRISON V. UNITED STATES*, the 4th Circuit Court held in 1932 opinion written by Judge Parker that "Trial judge may not direct verdict against plaintiff, where there is substantial evidence supporting plaintiff's case." and "Directed verdict is proper only if there is no substantial evidence to support recovery or where evidence is all against plaintiff." Judge Kent did exactly the opposite; the evidence is clearly on the side of this Petitioner...so much so that under applicable laws, it is not necessary to call expert witnesses....anyone can clearly see and understand.

One more quote by Judge Parker on point here states:'

"Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence, or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility."

Judge Kent did not have that problem...HE HAD TO KNOW that the had before him admissible, relevant, documented evidence which may not (can not) be refuted...most of it a matter of record. This, again, shows the malicious conspiracy and intent to deny constitutional rights...(they told on themselves by their conduct, etc.) and all the other illegal acts complained of herein are facts, and all parties are liable for their conduct...NOT IMMUNE, per their own acts with the proper laws

applied thereto as cited herein

WHEREFORE, Petitioner-Appellant prays that this Court (and in BANC) will accept this appeal and grant the following relief:

- (1) Remand the case for trial by jury per applicable laws.
- (2) Grant an amendment to Complaint since there has been developments (changes in status by courts) unforeseen and another actor should be added to the complaint.
- (3) Recuse Judge Bryan from the case since he gives the appearance of bias toward (for) Judge Kent, so as to provide fairness; plus he denied access (First Amend) rights.
- (4) Any further relief this Court Deems just and proper.

Respectfully Submitted,

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MEMORANDUM OF PARTIES

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For Defendant- Appellee
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CERTIFICATE OF SERVICE

I, MARIE M. MCMAHON, the undersigned Petitioner herein, pro se, do hereby certify that I have served a true copy of the foregoing Petition for Rehearing/Petition for Rehearing in BANC for Appeal upon Kevin L. Locklin, Counsel for Defendant- Appellee to his address at P O. Box 2908, Merrifield, Virginia 22116-2908, by U. S. Mail, first class, postage prepaid, this 12th day of March, 1990.

S/ Marie M. McMahon

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CITY OF WINCHESTER, VIRGINIA

June 12, 1990

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601
703-667-1815

Real Estate taxes are due June 5th and December 5th of each year.

*City Treasurer
W. H. Knee (ph)*

THE APPLE CAPITAL

CITY TREASURER

P.O. BOX 263

WINCHESTER, VIRGINIA 22601-0263



OPERATOR
JK

TIME
9:50:38

DATE
8/22/83

RECEIPT NUMBER
068235

REAL ESTATE TAX RECEIPT

06221
05243

1ST HALF

YEAR
83

PARCEL NUMBER
05243

BILL NUMBER
06221

OUTSTANDING TAX
.00

INTEREST
3.12

PENALTY
23.37

TAXES
233.70

TOTAL TAX PAID
260.19

DESCRIPTION

TAXMAP

L-33 E S
ROOSEVELT BLVD

271-04- - 33-

NAME
SCHRADER ANN S

PA by Warren F. Whitley

